VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 62

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., APPELLANT,

vs.

UNITED STATES.

No. 73

UNITED STATES, APPELLANT,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 62 FILED MAY 6, 1939

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[fol. A] [Caption omitted]

[fol. 1667]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[File endorsement omitted]

Civil Action No. 4482-'56

UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE,
Plaintiff,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION,
INCORPORATED, Defendant.

COMPLAINT FOR EQUITABLE RELIEF—Filed November 21, 1956

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the above-named defendant, and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed and this action is instituted against the above-named defendant under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, and under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, in order to prevent and restrain continued violations by the defendant, as hereinafter alleged, of Sections 1, 2 and 3 of the Sherman Act and of Section 7 of the Clayton Act.

[fol. 1668] 2. The alleged violations hereinafter described have been and are being executed, carried out, and made effective, in part, within the District of Columbia, and the defendant transacts business and is found within the District of Columbia and within the jurisdiction of this Court.

II

The Defendant

3. Maryland and Virginia Milk Producers Association, Incorporated, is hereby named the defendant herein. The defendant is a corporation organized and existing under the laws of the State of Maryland having its principal office in the District of Columbia. It is an agricultural cooperative association of nearly 2000 milk producers, most of whom are located in the States of Maryland and Virginia.

III

Definitions

4. As used herein, the term "milk" means the raw milk of cows prior to pasteurization.

5. As used herein, the term "fluid milk" means pasteurized milk sold by dealers for consumption in fluid form.

6. As used herein, the term "dealer" means a person, partnership or corporation engaged in the business of purchasing milk and processing, bottling, and distributing it in the form of fluid milk.

7. As used herein, the term "Washington metropolitan area" means the area comprising Montgomery and Prince Georges Counties, Maryland, the District of Columbia, Arlington and Fairfax Counties and the cities of Alexandria and Falls Church, Virginia.

8. As used herein, the term "Embassy" means Green Spring Milk Company, Inc., formerly known as Embassy Dairy, Inc., a corporation organized and existing under the laws of the State of Delaware, with offices and principal place of business at Edgewater, Maryland.

[fol. 1669] IV

Nature of Trade and Commerce

9. Milk sold as fluid milk by dealers in the Washington metropolitan area is and has been for many years regularly supplied by milk producers in the States of Maryland, Virginia, Pennsylvania and West Virginia. Producers and sellers in other states have also supplied milk for consumption as fluid milk in the Washington metropolitan area.

10. During 1954, milk with a value of approximately $35,000,000 was purchased from producers and sellers by dealers in the Washington metropolitan area.

11. Milk by its nature is perishable and, in order to reach consumers as wholesome milk in fluid form, must be moved promptly from farm through dealers' plants to consumers. Within a short time after production, milk is transported by producers and sellers, or their agents, to dealers' plants, where it is pasteurized and processed prior to immediate delivery and sale to consumers, stores and other outlets.

12. During 1955, approximately 92 percent of the milk sold Washington metropolitan area dealers was supplied by the defendant, while the remaining approximately 8 percent was supplied by three other producers' cooperative associations, by independent producers, and by other sellers.

13. In the sale of milk to dealers, the defendant's charges for milk are customarily based upon the utilization of the milk and upon the place of its consumption. The highest charges are levied by the defendant on milk sold to dealers for resale as fluid milk (Class I), while prices approximating one-half of said price are charged for identical milk used to make other dairy products (Classes II and III), i.e., cream, cheese, etc. The defendant further differentiates the prices it charges dealers for milk for fluid use, though it is of the same grade and quality, depending upon where the fluid milk is sold by dealers. The highest price is charged dealers for milk distributed by them in the Washington [fol. 1670] metropolitan area. For all milk resold as fluid milk in areas of Maryland and Virginia outside the Wash-

ington metropolitan area, dealers are charged substantially lower prices by the defendant. Price differentials also extend to milk of identical grade and quality sold in fluid form by dealers to federal installations in the States of Maryland and Virginia and in other states. In a typical period, the defendant's prices for milk for resale by dealers to federal installations tend to vary inversely with the distances of the installations from the Washington metropolitan area.

14. There is and has been from day to day a continuous flow of milk from the farms of members of the defendant, of members of other producers' cooperative associations, of independent milk producers, and from other sellers of milk in Maryland, Virginia, Pennsylvania, West Virginia, and other states, through dealers' plants in the Washington metropolitan area to consumers, stores, and other outlets in said area.

15. Milk consumed as fluid milk in the State of Maryland is and has been delivered daily from farms of members of the defendant and from farms of other producers located in the States of Virginia, Pennsylvania and West Virginia, to dealers' plants in the Washington metropolitan area, where, commingled with milk produced in Maryland, it is and has been processed and bottled, and from which it is and has been immediately transported to consumers, stores and other outlets in Maryland.

16. Milk consumed as fluid milk in the State of Virginia is and has been delivered daily from farms of members of the defendant and from farms of other producers located in the States of Maryland, Pennsylvania and West Virginia, to dealers' plants in the Washington metropolitan area, where, commingled with milk produced in Virginia, it is and has been processed and bottled, and from which it is and has been immediately transported to consumers, stores and other outlets in the State of Virginia.

[fol. 167] 17. The production and sale of milk to Washington metropolitan area dealers for resale as fluid milk to consumers, stores and other outlets in the States of Maryland and Virginia has constituted and does constitute interstate trade and commerce.

18. For some time prior to August 1954, Embassy was the largest dealer-outlet in the Washington metropolitan area for milk produced and supplied by others than the defendant. Embassy purchased its requirements of milk from approximately 125 independent producers in the States of Maryland and Virginia and from suppliers in other states. In 1953, it was the fourth largest dealer in fluid milk in the Washington metropolitan area, with total sales in excess of $4,000,000. In the same year, Embassy is estimated to have ranked first among dealers in the sale of fluid milk to federal installations in the Washington metropolitan area, and to have supplied approximately 50 percent of the fluid milk sold by said dealers to such installations. In sales to consumers, including federal installations, Embassy competed principally with dealers purchasing milk from the defendant. Said dealers were and are engaged in the distribution and sale of fluid milk in the District of Columbia and in the States of Maryland and Virginia.

19. Prior to August 1954, Embassy's plant and office were located in the District of Columbia. From said plant, it distributed and sold fluid milk in the District of Columbia and in the States of Maryland and Virginia. From time to time, Embassy submitted bids for fluid milk supply contracts at federal installations in the District of Columbia and in the States of Maryland and Virginia, and was awarded and performed fluid milk supply contracts at many federal installations therein.

20. The distribution and sale of fluid milk by Washington metropolitan area dealers constituted and does constitute trade and commerce in the District of Columbia and between the District of Columbia and states of the United States.

[fol. 1672]

V

Offenses Charged

Violations of Section 2 of the Sherman Act

21. Beginning in or about the year 1930 and continuing thereafter up to and including the date of the filing of this

complaint, the defendant has attempted to monopolize and has monopolized interstate trade and commerce in the supplying of milk for resale as fluid milk in the area comprising Montgomery and Prince Georges Counties, Maryland, the District of Columbia, Arlington and Fairfax Counties and the cities of Alexandria and Falls Church, Virginia, and has attempted to monopolize interstate trade and commerce in the supplying of milk for resale as fluid milk in other counties of Maryland and Virginia, in violation of Section 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act (15 U.S.C. 2).

22. In effectuating the offenses hereinbefore charged, the defendant has:

a. Fixed and maintained arbitrary and noncompetitive prices and terms of sale for milk.

b. Excluded, eliminated, and attempted to eliminate others, including producers and producers' agricultural cooperative associations not affiliated with defendant, from supplying milk to dealers.

c. Effected agreements with suppliers of milk, including agricultural cooperative associations, to eliminate competition between said suppliers and the defendant or to regulate the terms or conditions under which said suppliers would compete with the defendant.

d. Acquired and attempted to acquire dealer and manufacturing outlets by threats, inducements and other diverse means.

[fol. 1673] e. Threatened and undertaken diverse actions to induce or compel dealers to purchase milk from the defendant, and induced and assisted others to acquire dealer outlets purchasing milk from producers not affiliated with the defendant.

f. Required dealers to take full requirements of milk from the defendant or penalized dealers failing or refusing to do so.

g. Threatened and engaged in predatory pricing.

h. Practiced manifold discriminations among dealers purchasing milk from defendant.

i. Sought and urged action by governmental agencies for the purpose of excluding or eliminating competition.

j. Established and charged dealers higher prices for milk purchased for resale in the Washington metropolitan area and lower prices for milk purchased for resale outside the Washington metropolitan area.

k. Eliminated and attempted to eliminate competition with its dealer-customers by dealers purchasing milk from others than the defendant.

23. As a result of the aforesaid offenses, the defendant has, and for some years past has had, virtually absolute control over the aforesaid production and sale of milk and has unlawfully obtained and advanced its monopoly position therein, acquiring and exercising monopoly powers in a manner and to an extent not permitted by law to agricultural cooperative associations.

Violations of Sections 1 and 3 of the Sherman Act

24. On or about May 26, 1954, the defendant made and executed a contract with Embassy, by the terms of which the defendant agreed to purchase substantially all the assets of Embassy, said purchase having been theretofore duly authorized by the defendant's board of directors on or about May 14, 1954. The said contract provided, among [fol. 1674] other things, that Embassy would sell and the defendant would purchase the physical assets theretofore utilized and employed by Embassy in the conduct of its milk distribution business together with the good will attending said business; that Embassy would undertake to persuade its producers to ship their milk to either of two named dealers located outside the Washington metropolitan area, and that it would use its best efforts to persuade producers refusing to ship to either of said two dealers to become members of the defendant; and, in order that the

defendant might purchase the entire business of Embassy being done or capable of being done in the Washington metropolitan area, that Embassy covenanted and agreed that for a period of ten years it would not engage directly or indirectly in the milk distribution business in said area. The said contract was made and executed by the defendant for the purpose of eliminating Embassy as an outlet in the Washington metropolitan area for milk produced by others than the defendant and for the purpose of eliminating competition in said area between Embassy and dealers purchasing their requirements of milk from the defendant, in unreasonable restraint of the aforesaid trade and commerce in the production and sale of milk to Washington metropolitan area dealers, and in the distribution and sale of fluid milk in said area, in violation of Sections 1 and 3 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act (15 U.S.C. 1 and 3).

Violation of Section 7 of the Clayton Act

25. On or about July 26, 1954, the defendant purchased and acquired substantially all of the assets of Embassy. The effects of this acquisition have been and may be substantially to lessen competition, or to tend to create a monopoly, in the production and sale of milk to Washington metropolitan area dealers, and substantially to lessen [fol. 1675] competition in the distribution and sale of fluid milk by said dealers, in violation of Section 7 of the Act of October 15, 1914, c. 323, 38 Stat. 731, as amended, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act (15 U.S.C. 18).

VI

Effects of Violations

26. The aforesaid violations have had the following effects, among others:

a. Upon the acquisition of Embassy's assets, the defendant for a time increased its control of the pro-

duction and sale of milk to Washington metropolitan area dealers to approximately 95 percent of the total and thereafter controlled and now controls approximately 92 percent.

b. The whole or a material part of the competitive activity of Embassy, which was a substantial factor in competition in the purchase of milk and in the distribution and sale of fluid milk in the Washington metropolitan area, has been eliminated.

c. Producers of milk who formerly supplied Embassy have been foreclosed or diverted from independently supplying their milk to the Washington metropolitan area.

d. The principal outlet in the Washington metropolitan area for milk supplied other than by the defendant has been eliminated.

e. Competition in the production and sale of milk to dealers in the Washington metropolitan area has been and may be substantially lessened.

[fol. 1676] f. Competition at all levels of milk distribution in the Washington metropolitan area has been and may be substantially lessened by the elimination of milk supplied Embassy by producers and sellers other than the defendant.

g. Competition between the defendant and other suppliers in the sale of milk to dealers for resale as fluid milk to the federal government, and competition in dealer bidding for federal fluid milk supply contracts has been and may be substantially lessened.

h. A rigid and artificial pricing structure in the sale of milk has been created in the Washington metropolitan area, denying consumers the opportunity to buy fluid milk at prices resulting from free and open competition in the production and sale of milk.

i. The competition of producers and producers' cooperative associations with the defendant in the supplying of milk to dealers has been impaired, excluded and eliminated.

j. The competition between defendant's customers and other milk dealers, not purchasing milk from the defendant, has been impaired and injured.

k. Manifold discriminations among dealers purchasing milk have been practiced by the defendant.

l. The flow of milk in interstate commerce and in commerce in the District of Columbia and between the District of Columbia and states of the United States has been unreasonably impeded, curtailed and diminished.

27. The violations alleged in the foregoing paragraphs and the effects thereof are continuing and will continue unless the relief hereinafter prayed for is granted.

[fol. 1677]

VII

Prayer

Wherefore, plaintiff prays:

(1) That the aforesaid contract between the defendant and Embassy in restraint of the hereinbefore described interstate trade and commerce and trade and commerce in the District of Columbia and between the District of Columbia and the several states be adjudged and decreed to be unlawful, in violation of Sections 1 and 3 of the Sherman Act;

(2) That the acquisition by the defendant of the assets of Embassy be adjudged and decreed to be unlawful, in violation of Section 7 of the Clayton Act;

(3) That the attempts to monopolize and monopolization, as aforesaid, be adjudged and decreed to be unlawful, and that the contracts, agreements, acquisitions, acts and practices alleged in this complaint be adjudged and decreed to be unlawful, in violation of Section 2 of the Sherman Act;

(4) That the court adjudge and decree that the defendant has made and executed a contract in restraint of trade and commerce, in violation of Sections 1 and 3 of the Sherman Act; that the defendant has acquired assets of a corporation engaged in commerce, the effects of which acquisition

may be substantially to lessen competition or tend to create a monopoly, in violation of Section 7 of the Clayton Act; and that the defendant has attempted to monopolize and has monopolized interstate trade and commerce in the production and sale of milk, in violation of Section 2 of the Sherman Act;

(5) That the defendant be required, under such terms and conditions as the court may prescribe, to divest itself of the assets acquired from Embassy and of such other assets as the court deems necessary to dissipate the effects of the violations of law, and to take such other steps as may be necessary to restore substantial competition in the produc-
[fol. 1678] tion and sale of milk and in the distribution and sale of fluid milk;

(6) That, in accordance with such limitations as the court may prescribe, the defendant be enjoined from acquiring the assets or stock of any other firm or firms engaged in the production of milk or in the distribution, manufacture or sale of milk in the form of fluid milk or milk products;

(7) That the defendant be required, under such terms and conditions as the court may prescribe, to take such action with respect to the membership status of, and its membership contracts with, individual producers as the court deems necessary to effect substantial competition in the production and sale of milk and in the distribution and sale of fluid milk;

(8) That the defendant be required, under such terms and conditions as the court may prescribe, to make such changes in its pricing policies, terms and conditions governing the sale of milk to dealers, as the court deems necessary to effect substantial competition in the production and sale of milk and in the distribution and sale of fluid milk;

(9) That the defendant and its officers, directors, agents, representatives, successors and assigns, and all persons and corporations acting or claiming to act on behalf of them, be perpetually enjoined from unlawfully attempting to monopolize or unlawfully monopolizing the aforesaid trade and commerce, and that they be perpetually enjoined from engaging in or participating in practices, contracts, rela-

tionships or understandings, or claiming any rights thereunder, having the purpose or effect of continuing, reviving or renewing any of the aforesaid violations;

(10) That the plaintiff have such other, further and different relief as the nature of the case may require and the court may deem just and proper;

[fol. 1679] (11) That the plaintiff recover the costs of this suit.

Herbert Brownell, Jr., Attorney General.

Victor R. Hansen, Assistant Attorney General.

Ephraim Jacobs, Attorney, Department of Justice.

John T. Duffner, Attorney, Department of Justice.

Oliver Gasch, United States Attorney.

Joseph J. Saunders, Edna Lingreen, J. E. Waters, Attorneys, Department of Justice.

[fol. 1680] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4482-56

UNITED STATES OF AMERICA, Plaintiff,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, Defendant.

AMENDED COMPLAINT FOR EQUITABLE RELIEF—
Filed February 7, 1957

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the above-named defendant, and complains and alleges as follows:

I

Jurisdiction and Venue

1. This amended complaint is filed and this action is instituted against the above-named defendant under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, and under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, in order to prevent and restrain continued violations by the defendant, as hereinafter alleged, of Sections 1, 2 and 3 of the Sherman Act and of Section 7 of the Clayton Act.

[fol. 1681] 2. The alleged violations hereinafter described have been and are being executed, carried out, and made effective, in part, within the District of Columbia, and the defendant transacts business and is found within the District of Columbia and within the jurisdiction of this Court.

II

The Defendant

3. Maryland and Virginia Milk Producers Association, Incorporated, is hereby named the defendant herein. The defendant is a corporation organized and existing under the laws of the State of Maryland having its principal office in the District of Columbia. It is an agricultural cooperative association of nearly 2,000 milk producers, most of whom are located in the States of Maryland and Virginia.

III

Definitions

4. As used herein, the term "milk" means the raw milk of cows prior to pasteurization.

5. As used herein, the term "fluid milk" means pasteurized milk sold by dealers for consumption in fluid form.

6. As used herein, the term "dealer" means a person, partnership or corporation engaged in the business of purchasing milk and processing, bottling, and distributing it in the form of fluid milk.

7. As used herein, the term "Washington metropolitan area" means the area comprising Montgomery and Prince Georges Counties, Maryland, the District of Columbia, Arlington and Fairfax Counties and the cities of Alexandria and Falls Church, Virginia.

8. As used herein, the term "Embassy" means Green Spring Milk Company, Inc., formerly known as Embassy Dairy, Inc., a corporation organized and existing under the laws of the State of Delaware, with offices and principal place of business at Edgewater, Maryland.

[fol. 1682]

IV

Nature of Trade and Commerce

9. Milk sold as fluid milk by dealers in the Washington metropolitan area is and has been for many years regularly supplied by milk producers in the States of Maryland, Virginia, Pennsylvania and West Virginia. Producers and sellers in other states have also supplied milk for consumption as fluid milk in the Washington metropolitan area.

10. During 1954, milk with a value of approximately $35,000,000 was purchased from producers and sellers by dealers in the Washington metropolitan area.

11. Milk by its nature is perishable and, in order to reach consumers as wholesome milk in fluid form, must be moved promptly from farms through dealers' plants to consumers. Within a short time after production, milk is transported by producers and sellers, or their agents, to dealers' plants, where it is pasteurized and processed prior to immediate delivery and sale to consumers, stores and other outlets.

12. During 1955, approximately 92 per cent of the milk sold Washington metropolitan area dealers was supplied by the defendant, while the remaining approximately 8 per cent was supplied by three other producers' cooperative associations, by independent producers, and by other sellers.

13. In the sale of milk to dealers, the defendant's charges for milk are customarily based upon the utilization of the milk and upon the place of its consumption. The highest charges are levied by the defendant on milk sold to dealers for resale as fluid milk (Class I), while prices approximating one-half of said price are charged for identical milk used to make other dairy products (Classes II and III), i.e., cream, cheese, etc. The defendant further differentiates the prices it charges dealers for milk for fluid use, though it is of the same grade and quality, depending upon where the fluid milk is sold by dealers. The highest price is charged dealers for milk distributed by them in the Washington [fol. 1683] metropolitan area. For all milk resold as fluid milk in areas of Maryland and Virginia outside the Washington metropolitan area, dealers are charged substantially lower prices by the defendant. Price differentials also extend to milk of identical grade and quality sold in fluid form by dealers to federal installations in the States of Maryland and Virginia and in other states. In a typical period, the defendant's prices for milk for resale by dealers to federal installations tend to vary inversely with the distances of the installations from the Washington metropolitan area.

14. There is and has been from day to day a continuous flow of milk from the farms of members of the defendant, of members of other producers' cooperative associations, of independent milk producers, and from other sellers of milk in Maryland, Virginia, Pennsylvania, West Virginia, and other states, through dealers' plants in the Washington metropolitan area to consumers, stores, and other outlets in said area.

15. Milk consumed as fluid milk in the State of Maryland is and has been delivered daily from farms of members of the defendant and from farms of other producers located in the States of Virginia, Pennsylvania and West Virginia, to dealers' plants in the Washington metropolitan area, where, commingled with milk produced in Maryland, it is and has been processed and bottled, and from which it is and has been immediately transported to consumers, stores and other outlets in Maryland.

16. Milk consumed as fluid milk in the State of Virginia is and has been delivered daily from farms of members of the defendant and from farms of other producers located in the States of Maryland, Pennsylvania and West Virginia, to dealers' plants in the Washington metropolitan area, where, commingled with milk produced in Virginia, it is and has been processed and bottled, and from which it is and has been immediately transported to consumers, stores and other outlets in the State of Virginia.

[fol. 1684] 17. The production and sale of milk to Washington metropolitan area dealers for resale as fluid milk to consumers, stores and other outlets in the States of Maryland and Virginia has constituted and does constitute interstate trade and commerce.

18. For some time prior to August 1954, Embassy was the largest dealer-outlet in the Washington metropolitan area for milk produced and supplied by others than the defendant. Embassy purchased its requirements of milk from approximately 125 independent producers in the States of Maryland and Virginia and from suppliers in other states. In 1953, it was the fourth largest dealer in fluid milk in the Washington metropolitan area, with total sales in excess of $4,000,000. In the same year, Embassy is estimated to have ranked first among dealers in the sale of fluid milk to federal installations in the Washington metropolitan area, and to have supplied approximately 50 per cent of the fluid milk sold by said dealers to such installations. In sales to consumers, including federal installations, Embassy competed principally with dealers purchasing milk from the defendant. Said dealers were and are engaged in the distribution and sale of fluid milk in the District of Columbia and in the States of Maryland and Virginia.

19. Prior to August, 1954, Embassy's plant and office were located in the District of Columbia. From said plant, it distributed and sold fluid milk in the District of Columbia and in the States of Maryland and Virginia. From time to time, Embassy submitted bids for fluid milk supply contracts at federal installations in the District of Columbia

and in the States of Maryland and Virginia, and was awarded and performed fluid milk supply contracts at many federal installations therein.

20. The distribution and sale of fluid milk by Washington metropolitan area dealers constituted and does constitute trade and commerce in the District of Columbia and between the District of Columbia and states of the United States.

[fol. 1685]

V

Offenses Charged

Violations of Section 2 of the Sherman Act

21. Beginning in or about the year 1930 and continuing thereafter up to and including the date of the filing of this amended complaint, the defendant has attempted to monopolize and has monopolized interstate trade and commerce in the supplying of milk for resale as fluid milk in the area comprising Montgomery and Prince Georges Counties, Maryland, the District of Columbia, Arlington and Fairfax Counties and the cities of Alexandria and Falls Church, Virginia, and has attempted to monopolize interstate trade and commerce in the supplying of milk for resale as fluid milk in other counties of Maryland and Virginia, in violation of Section 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act (15 U.S.C. 2).

22. In effectuating the offenses hereinbefore charged, the defendant has, among other things:

a. Fixed and maintained arbitrary and noncompetitive prices and terms of sale for milk.

b. Excluded, eliminated, and attempted to eliminate others, including producers and producers' agricultural cooperative associations not affiliated with defendant, from supplying milk to dealers.

c. Effected agreements with suppliers of milk, including agricultural cooperative associations, to eliminate competition between said suppliers and the de-

fendant or to regulate the terms or conditions under which said suppliers would compete with defendant.

d. Acquired and attempted to acquire dealer and manufacturing outlets by threats, inducements and other diverse means.

[fol. 1686] e. Threatened and undertaken diverse actions to induce or compel dealers to purchase milk from the defendant, and induced and assisted others to acquire dealer outlets purchasing milk from producers not affiliated with the defendant.

f. Required dealers to take full requirements of milk from the defendant or penalized dealers failing or refusing to do so.

g. Threatened and engaged in predatory pricing.

h. Practiced manifold discriminations among dealers purchasing milk from defendant.

i. Sought and urged action by governmental agencies for the purpose of excluding or eliminating competition.

j. Established and charged dealers higher prices for milk purchased for resale in the Washington metropolitan area and lower prices for milk purchased for resale outside the Washington metropolitan area.

k. Eliminated and attempted to eliminate competition with its dealer-customers by dealers purchasing milk from others than the defendant.

23. As a result of the aforesaid offenses, the defendant has, and for some years past has had, virtually absolute control over the aforesaid production and sale of milk and has unlawfully obtained and advanced its monopoly position therein, acquiring and exercising monopoly powers in a manner and to an extent not permitted by law to agricultural cooperative associations.

Violations of Sections 1 and 3 of the Sherman Act

24. Beginning in or about April, 1954 and continuing thereafter, up to and including the date of the filing of

this amended complaint, the defendant and certain co-conspirators, including Embassy, Green Spring Dairy, Inc., Green Spring Milk Company, Homestead Dairy Products Company and others, have been engaged in an unlawful [fol. 1687] combination and conspiracy consisting of a continuing agreement and concert of action among the defendant and the co-conspirators to eliminate and foreclose competition in the Washington metropolitan area with the defendant and with dealers purchasing milk from the defendant.

25. The defendant and the co-conspirators have effectuated the aforesaid combination and conspiracy in part by the following means:

a. The defendant and Embassy agreed to make, executed and carried out a contract for the transfer of substantially all of Embassy's assets to the defendant.

b. The co-conspirators covenanted and agreed that for a period of ten years none of them would engage directly or indirectly in the sale or distribution of milk, cream or other dairy products within an area mutually agreed upon by the defendant and the co-conspirators.

c. The defendant and co-conspirators made arrangements for, and assisted in, the diversion or foreclosure of producers of milk who had supplied Embassy from independently supplying their milk to the Washington metropolitan area market, giving such producers the alternative of supplying co-conspirators Green Spring Dairy, Inc., at Baltimore, Maryland, or Green Spring Milk Company at Annapolis, Maryland, or becoming members of the defendant association.

26. On or about May 26, 1954, the defendant made and executed a contract with Embassy, by the terms of which the defendant agreed to purchase substantially all the assets of Embassy, said purchase having been theretofore duly authorized by the defendant's board of directors on or about May 14, 1954. The said contract provided, among other things, that Embassy would sell and the defendant would purchase the physical assets theretofore utilized and

employed by Embassy in the conduct of its milk distribution business together with the good will attending said busi-
[fol. 1688] ness; that Embassy would undertake to persuade its producers to ship their milk to either of two named dealers located outside the Washington metropolitan area, and that it would use its best efforts to persuade producers refusing to ship to either of said two dealers to become members of the defendant; and, in order that the defendant might purchase the entire business of Embassy being done or capable of being done in the Washington metropolitan area, that Embassy covenanted and agreed that for a period of ten years it would not engage directly or indirectly in the milk distribution business in an area mutually agreed upon, consisting of the District of Columbia and adjacent parts of the States of Maryland and Virginia, and that it would arrange for others named in said contract to covenant not to engage directly or indirectly in the milk distribution business in said area. The aforesaid contract was made and executed by the defendant for the purpose of eliminating Embassy as an outlet in the Washington metropolitan area for milk produced by others than the defendant and for the purpose of eliminating competition in said area between Embassy and dealers purchasing their requirements of milk from the defendant.

27. On or about May 26, 1954, the defendant became a party to another contract, by the terms of which Green Spring Dairy, Inc., Green Spring Milk Company, Homestead Dairy Products Company, James J. Ward, James J. Ward, Jr., John Ward and R. Jeanne Ward covenanted and agreed that for a period of ten years none of them would engage directly or indirectly in the sale or distribution of milk, cream or other dairy products in an area mutually agreed upon, consisting of the District of Columbia and adjacent parts of the States of Maryland and Virginia.

28. The aforesaid combination and conspiracy and the aforesaid contracts were and are in unreasonable restraint of trade and commerce in the production and sale of milk to Washington metropolitan area dealers, and in the distribution and sale of fluid milk in said area, in violation of

Sections 1 and 3 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect [fol. 1689] trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act (15 U.S.C. 1 and 3).

Violation of Section 7 of the Clayton Act

29. On or about July 26, 1954, the defendant purchased and acquired substantially all of the assets of Embassy. The effects of this acquisition have been and may be substantially to lessen competition, or to tend to create a monopoly, in the production and sale of milk to Washington metropolitan area dealers, and substantially to lessen competition in the distribution and sale of fluid milk by said dealers, in violation of Section 7 of the Clayton Act (15 U.S.C. 18), Act of October 15, 1914, c. 323, 38 Stat. 731, as amended by Act of December 29, 1950, c. 1184, 64 Stat. 1125.

VI

Effects of Violations

30. The aforesaid violations have had the following effects, among others:

a. Upon the acquisition of Embassy's assets, the defendant for a time increased its control of the production and sale of milk to Washington metropolitan area dealers to approximately 95 per cent of the total and thereafter controlled and now controls approximately 92 per cent.

b. The whole or a material part of the competitive activity of Embassy, which was a substantial factor in competition in the purchase of milk and in the distribution and sale of fluid milk in the Washington metropolitan area, has been eliminated.

[fol. 1690] c. Producers of milk who formerly supplied Embassy have been foreclosed or diverted from independently supplying their milk to the Washington metropolitan area.

d. The principal outlet in the Washington metropolitan area for milk supplied other than by the defendant has been eliminated.

e. Competition in the production and sale of milk to dealers in the Washington metropolitan area has been and may be substantially lessened.

f. Competition at all levels of milk distribution in the Washington metropolitan area has been and may be substantially lessened by the elimination of milk supplied Embassy by producers and sellers other than the defendant.

g. Competition between the defendant and other suppliers in the sale of milk to dealers for resale as fluid milk to the federal government, and competition in dealer bidding for federal fluid milk supply contracts has been and may be substantially lessened.

h. A rigid and artificial pricing structure in the sale of milk has been created in the Washington metropolitan area, denying consumers the opportunity to buy fluid milk at prices resulting from free and open competition in the production and sale of milk.

i. The competition of producers and producers' cooperative associations with the defendant in the supplying of milk to dealers has been impaired, excluded and eliminated.

j. The competition between defendant's customers and other milk dealers, not purchasing milk from the defendant, has been impaired and injured.

[fol. 1691] k. Manifold discriminations among dealers purchasing milk have been practiced by the defendant.

l. The flow of milk in interstate commerce and in commerce in the District of Columbia and between the District of Columbia and states of the United States has been unreasonably impeded, curtailed and diminished.

31. The violations alleged in the foregoing paragraphs and the effects thereof are continuing and will continue unless the relief hereinafter prayed for is granted.

VII.

Prayer.

Wherefore, plaintiff prays:

(1) That the aforesaid combination and conspiracy be adjudged and decreed to be unlawful, in violation of Sections 1 and 3 of the Sherman Act;

(2) That the aforesaid contracts between the defendant and Embassy and between the defendant and Green Spring Dairy, Inc., Green Spring Milk Company, Homestead Dairy Products Company, James J. Ward, James J. Ward, Jr., John Ward and R. Jeanne Ward in restraint of the hereinbefore described interstate trade and commerce and trade and commerce in the District of Columbia and between the District of Columbia and the several states be adjudged and decreed to be unlawful, in violation of Sections 1 and 3 of the Sherman Act;

(3) That the acquisition by the defendant of the assets of Embassy be adjudged and decreed to be unlawful, in violation of Section 7 of the Clayton Act;

(4) That the attempts to monopolize and monopolization, as aforesaid, be adjudged and decreed to be unlawful, and that the contracts, agreements, acquisitions, acts and practices alleged in this complaint be adjudged and decreed to be unlawful, in violation of Section 2 of the Sherman Act;

[fol. 1692] (5) That the court adjudge and decree that the defendant has engaged in a combination and conspiracy and has entered into contracts in restraint of trade and commerce, in violation of Sections 1 and 3 of the Sherman Act; that the defendant has acquired assets of a corporation engaged in commerce, the effects of which acquisition may be substantially to lessen competition or tend to create a monopoly, in violation of Section 7 of the Clayton Act; and that the defendant has attempted to monopolize and has monopolized interstate trade and commerce in the pro-

duction and sale of milk, in violation of Section 2 of the Sherman Act;

(6) That the defendant be required, under such terms and conditions as the court may prescribe, to divest itself of the assets acquired from Embassy and of such other assets as the court deems necessary to dissipate the effects of the violations of law, and to take such other steps as may be necessary to restore substantial competition in the production and sale of milk and in the distribution and sale of fluid milk;

(7) That, in accordance with such limitations as the court may prescribe, the defendant be enjoined from acquiring the assets or stock of any other firm or firms engaged in the production of milk or in the distribution, manufacture or sale of milk in the form of fluid milk or milk products;

[fol. 1693] (8) That the defendant be required, under such terms and conditions as the court may prescribe, to take such action with respect to the membership status of, and its membership contracts with, individual producers as the court deems necessary to effect substantial competition in the production and sale of milk and in the distribution and sale of fluid milk.

(9) That the defendant be required, under such terms and conditions as the court may prescribe, to make such changes in its pricing policies, terms and conditions governing the sale of milk to dealers, as the court deems necessary to effect substantial competition in the production and sale of milk and in the distribution and sale of fluid milk;

(10) That the defendant and its officers, directors, agents, representatives, successors and assigns, and all persons and corporations acting or claiming to act on behalf of them, be perpetually enjoined from unlawfully attempting to monopolize or unlawfully monopolizing the aforesaid trade and commerce, and that they be perpetually enjoined from engaging in or participating in practices, contracts, relationships or understandings, or claiming any rights thereunder, having the purpose or effect of continuing, reviving or renewing any of the aforesaid violations;

(11) That the plaintiff have such other, further and different relief as the nature of the case may require and the court may deem just and proper;

[fol. 1694] (12) That the plaintiff recover the costs of this suit.

Herbert Brownell, Jr., Attorney General.

Victor R. Hansen, Assistant Attorney General.

Ephraim Jacobs, Attorney, Department of Justice.

John T. Duffner, Attorney, Department of Justice.

Oliver Gasch, United States Attorney.

Joseph J. Saunders, Edna Lingreen, J. E. Waters, Attorneys, Department of Justice.

[fol. 1695] Certificate of Service (omitted in printing).

[fol. 1696] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER TO AMENDED COMPLAINT—Filed February 18, 1957

Defendant (hereinafter sometimes referred to as "the Association") answers the amended complaint herein as follows:

First Defense

1. Defendant denies each and every allegation of paragraph 1, except that it admits that the plaintiff purports to bring this action and to invoke the jurisdiction of this Court under the antitrust laws specified in said paragraph.

Further answering paragraph 1, defendant denies that either Section 1 or 2 of the Sherman Act (15 U.S.C. §§ 1, 2) is applicable to the alleged acts, transactions, courses of conduct or effects asserted to constitute violations of the antitrust laws arising in the District of Columbia or between the District of Columbia and any State or States:

and denies that this Court has jurisdiction under either of said sections to hear, determine or render judgment on account of any of the said matters asserted to have arisen in the District of Columbia or between the District of Columbia and any State or States. Defendant avers that to the extent that this Court may have jurisdiction over any of the said matters, such jurisdiction must be found in Section 3 of the Sherman Act or Section 7 of the Clayton Act.

[fol. 1697] 2. Defendant denies each and every allegation of paragraph 2, except that it admits that it transacts business and is found within the District of Columbia and within the territorial jurisdiction of this Court.

3. Defendant admits the allegations of paragraph 3.

Further answering paragraph 3, defendant avers that during the month of January 1957 the Association represented 1,918 dairy farms, 875 of which were located in the State of Maryland, 948 in the State of Virginia, 47 in the State of Pennsylvania, and 48 in the State of West Virginia. The membership of the Association is and has been, since its formation, limited to milk producers. The purposes for which the Association was formed, has been and is being conducted include, among others, encouraging better and more economical methods of producing dairy products, securing better results in marketing and advertising the products of its members, arranging for the transportation and handling of the products of its members, handling, storing, marketing and distributing milk produced by its members. In conducting its business, the Association has made and makes the necessary contracts and agreements to effect such purposes. The Association has no capital stock and operates on a non-profit basis for the mutual benefit of its members as producers. It is obligated to and does distribute any surplus or excess remaining at the end of any year, over and above the costs of doing business, on a patronage basis to its members. The voting rights of members of the Association are equal, and each member in good standing has one vote. Since its formation, the Association has not dealt in products of non-members to an amount greater in value than such as were handled by it for its members.

4. Defendant admits the allegations of paragraph 4 in so far as they purport to define the term "milk" as used in the amended complaint, but denies that such definition is otherwise appropriate or descriptive.

[fol. 1698] 5. Defendant admits the allegations of paragraph 5 in so far as they purport to define the term "fluid milk" as used in the amended complaint, but denies that such definition is otherwise appropriate or descriptive.

Further answering paragraph 5, defendant avers that pasteurized milk in fluid form is principally used as a beverage, a food for children and an ingredient in the preparation of other foods or beverages. In each of its uses, pasteurized milk in fluid form competes directly with numerous other products, including evaporated milk, condensed milk, dry milk powder, etc. As used in this answer, the term "fluid milk" refers to pasteurized milk in fluid form.

6. Defendant admits the allegations of paragraph 6 in so far as they purport to define the term "dealer" as used in the amended complaint, but denies that such definition is otherwise appropriate or descriptive.

7. Defendant admits the allegations of paragraph 7 in so far as they purport to define the term "Washington metropolitan area" as used in the amended complaint, but denies that such definition is otherwise appropriate or descriptive.

8. Defendant admits the allegations of paragraph 8 in so far as they purport to define the term "Embassy" as used in the amended complaint, but denies that Green Spring Milk Company, Inc. was ever known as Embassy Dairy, Inc. or that the offices or principal place of business of Embassy Dairy, Inc. were located at Edgewater, Maryland. Defendant further denies that such definition is appropriate or descriptive.

9. Defendant admits the allegations of paragraph 9.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10.

[fol. 1699] 11. Defendant admits that milk is perishable by nature and that within a short time after production it must be and is transported to dealers' plants, where it is pasteurized and processed prior to delivery and sale to consumers, stores and other outlets. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 11.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12.

13. Defendant denies the allegations of paragraph 13, except that it admits and avers that the milk which it furnishes to dealers is, for the purpose of pricing, classified into three categories, according to use. Class I consists of milk resold by dealers as fluid milk, and is the highest price category. Class II is composed of milk processed into cottage cheese and cream. Class III comprises milk remaining after all Class I and Class II uses are accounted for; milk in this category is sold by dealers for manufacture into by-products, such as ice cream and other dairy products. This pricing plan is commonly known as the classified use plan. The Association adopted this classified use plan in 1940 pursuant to a formal milk marketing order under the Agricultural Marketing Act (7 U.S.C. § 608 et seq.) promulgated by the Secretary of Agriculture. Such a plan, or variations thereof, is in effect in virtually every milk market in the United States. Prices under this plan are not necessarily applicable to milk furnished to dealers for resale as fluid milk outside of the Washington metropolitan area or to Government installations. The prices charged by the Association for milk furnished to dealers for resale as fluid milk outside of the Washington metropolitan area or to Government installations are frequently lower than the Class I price for the Washington metropolitan area.

14. Defendant admits that there is and has been from day to day a continuous flow of milk from the farms of its members to dealers' plants in the Washington metropolitan area prior to delivery and sale to consumers, stores, and

[fol. 1700] other outlets in said area. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 14.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15.

16. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16.

17. Defendant denies the allegations of paragraph 17.

18. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 18, except that it admits that certain dealers purchasing milk from defendant were and are engaged in the distribution and sale of fluid milk in the District of Columbia and in the States of Maryland and Virginia.

19. Defendant denies the allegations of paragraph 19 in view of the definitions of "Embassy" and "fluid milk" contained in paragraphs 8 and 5 of the amended complaint.

20. Defendant admits the allegations of paragraph 20 as to certain Washington metropolitan area dealers, but is without knowledge or information sufficient to form a belief as to the truth of said allegations with respect to other Washington metropolitan area dealers.

21. Defendant denies the allegations of paragraph 21.

22. Defendant denies the allegations of paragraph 22.

23. Defendant denies the allegations of paragraph 23.

24. Defendant denies the allegations of paragraph 24.

25. Defendant denies the allegations of paragraph 25.

26. Defendant denies the allegations of paragraph 26, except that it admits and avers that on May 14, 1954, the Association's Board of Directors authorized it to accept [fol. 1701] the offer of Embassy Dairy, Inc. to sell certain of its assets and that on May 26, 1954, it made and executed a contract with Embassy Dairy, Inc., whereby it agreed

to purchase said assets. This contract provided, among other things, that upon the Association's payment of the agreed-upon purchase price, it would receive from Embassy Dairy, Inc. its good will, milk routes and milk business as a going concern, certain specified physical assets, leases on certain real estate and machines, all patents, trademarks, trade names and slogans used by Embassy Dairy, Inc., inventories of dairy products, supplies and materials and other assets. The contract further gave Embassy Dairy, Inc. the right to attempt to persuade as many of its producers as possible to ship their milk to Embassy Dairy, Inc.'s affiliated companies, the Green Spring Dairy, Inc. or Green Spring Milk Company, Inc. and, in the event any of its producers refused, Embassy Dairy, Inc. agreed it would then undertake to persuade them to become members of the Association. The contract further provided that the Association's object in executing the agreement was to purchase from Embassy Dairy, Inc. the entire milk business of Embassy Dairy, Inc. and its owners and affiliated companies being done or capable of being done within the Washington market sales area as defined in the agreement. In consideration of the said contract, Embassy Dairy, Inc. covenanted, and agreed to arrange that Green Spring Dairy, Inc., Green Spring Milk Company, Inc., Homestead Dairy Products Company, James J. Ward, James J. Ward, Jr., John Ward, and R. Jeanne Ward, all of whom were officers, stockholders, and/or affiliated companies of Embassy Dairy, Inc., would separately covenant, that for a period of ten years each of them would not engage, either directly or indirectly, in the wholesale or retail sale or distribution of milk, cream or other dairy products in the defined area.

27. Defendant admits the allegations of paragraph 27.

28. Defendant denies the allegations of paragraph 28.

[fol. 1702] 29. Defendant denies the allegations of paragraph 29, except that it admits that on July 26, 1954, it purchased and acquired certain assets from Embassy Dairy, Inc.

Further answering paragraph 29, defendant avers that in May 1954 the report of its prospective acquisition of cer-

tain assets of Embassy Dairy, Inc. was published in the Washington newspapers. Upon inquiry by the Department of Justice, the Association furnished full information concerning the matter. Thereafter, pursuant to the agreement of May 26, 1954, the Association on July 26, 1954, acquired the said assets from Embassy Dairy, Inc. Defendant further avers that plaintiff was afforded ample opportunity to challenge, and to seek to enjoin and restrain under Section 7 of the Clayton Act the purchase and acquisition of Embassy Dairy, Inc.'s assets. More than eight months after the said purchase and acquisition, the plaintiff on March 31, 1955, caused a grand jury to be impanelled in the United States District Court for the District of Columbia to inquire into, among other things, the acquisition by the Association of Embassy Dairy, Inc.'s assets. For more than six months thereafter the grand jury investigated said contract and acquisition, and all facts and circumstances surrounding it. On October 12, 1955, the grand jury was discharged without any indictment of the Association arising out of the Embassy Dairy, Inc. transaction. The complaint herein was not filed until November 21, 1956, more than 27 months after the said contract and acquisition. Under such circumstances, the amended complaint, in so far as it alleges a violation of Section 7 of the Clayton Act, cannot be sustained.

30. Defendant denies the allegations of paragraph 30.

31. Defendant denies the allegations of paragraph 31.

Second Defense

32. The complaint fails to state a claim upon which relief can be granted.

[fol. 1703]

Third Defense: Capper-Volstead Act

33. The Association is and has been, since its formation, a cooperative agricultural organization composed exclusively of dairymen engaged in the production of milk. The character, purposes, obligations and operations of the Association are described in paragraph 3 of this answer. The Association's contract to purchase assets, and its

purchase and acquisition of assets, from Embassy Dairy, Inc. were necessary to effect the purposes for which the Association was formed, has been and is being conducted.

The Association has been and is a cooperative agricultural organization within the meaning of Sections 1 and 2 of the Capper-Volstead Act (7 U.S.C. §§ 291, 292). As such, it is exempt and immune from the antitrust laws in respect of the matters, transactions, courses of conduct and effects alleged in the amended complaint.

The Secretary of Agriculture has never charged that the Association monopolizes or restrains trade to such an extent that the price of milk is or has been unduly enhanced thereby; no order has been issued or served by the Secretary of Agriculture upon the Association directing it to cease and desist from monopolization or restraint of trade; nor has the Department of Justice been authorized by the Secretary of Agriculture to proceed in any manner against the Association. By virtue of the foregoing,

(a) the Association cannot be held or construed in this proceeding, as alleged in paragraphs 21, 22 and 23 of the amended complaint, to have attempted to monopolize or to have monopolized interstate trade and commerce in the supplying of milk for resale as fluid milk in violation of Section 2 of the Sherman Act;

(b) the Association's contract to purchase and its purchase and acquisition of assets of Embassy Dairy, Inc., and the other acts alleged in paragraphs 24 through 28 of the [fol. 1704] amended complaint, cannot be held or construed to be a contract, combination or conspiracy, or a means of effectuating a combination or conspiracy, in violation of Section 1 or 3 of the Sherman Act; and

(c) the Association's contract to purchase and its purchase, acquisition and utilization of assets of Embassy Dairy, Inc., as alleged in paragraph 29 of the amended complaint, cannot be held or construed to be in violation of Section 7 of the Clayton Act.

Fourth Defense: Primary Jurisdiction

34. The Association denies that it entered into a combination or conspiracy or that any of its acts were illegal.

It avers that it purchased the assets of Embassy Dairy, Inc. in good faith as a normal business operation and as a legitimate means of marketing its members' milk. Under the doctrine of primary jurisdiction plaintiff has no right to invoke the jurisdiction of this Court in advance of action by the Secretary of Agriculture under the provisions of the Capper-Volstead Act (7 U.S.C. §§291, 292).

Fifth Defense: Clayton Act §6

35. The Association is and has been, since its formation, a cooperative agricultural organization composed exclusively of dairymen, instituted and operated for the purposes of mutual help, and not having capital stock or being conducted for profit. As such, the Association and its operations are exempt and immune from the antitrust laws by virtue of Section 6 of the Clayton Act (15 U.S.C. §17) and cannot be held or construed to be an illegal combination or conspiracy in restraint of trade under the antitrust laws in respect of any of the matters, transactions, courses of conduct or effects alleged in the amended complaint.

[fol. 1705] *Sixth Defense:*

District of Columbia Code §29-842

36. The Association is and has been, since it was formed and organized under the laws of the State of Maryland, an agricultural organization operating on a cooperative basis and composed exclusively of dairymen, instituted for the purposes of mutual help and not having capital stock or being conducted for profit. It has complied with all the applicable laws of the State of Maryland and is licensed and entitled to do business in the District of Columbia. As such, the Association has complied with the provisions of Chapter 8 of Title 29, District of Columbia Code (1951 ed.), and by virtue of Section 842 neither the Association nor its operations can be deemed a conspiracy or combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily in respect of any of the matters, transactions, courses of conduct or effects alleged in the amended complaint.

Seventh Defense:

Agricultural Marketing Act

37. For many of the years embraced by the allegations of the amended complaint, the activities and conduct of the Association were carried on in full compliance with, and effectuation of, a formal marketing order under the Agricultural Marketing Act (7 U.S.C. §608 et seq.) promulgated by the Secretary of Agriculture. Those acts, transactions and courses of conduct alleged in the amended complaint which occurred during the period of said marketing order are exempt and immune thereby from the antitrust laws and do not constitute bases upon which relief can be granted.

Eighth Defense:

38. In a criminal action instituted in this Court by the plaintiff herein against defendant herein, and others, on March 8, 1948, entitled United States of America v. Mary-[fol. 1706] land & Virginia Milk Producers Association, Incorporated, et al., Criminal No. 294-48, the Association was charged with violations of the antitrust laws predicated on the same alleged acts, transactions, courses of conduct and effects during the period 1930-1948 which are embraced in the amended complaint herein. On May 15, 1950, this Court determined many of said allegations adversely to the plaintiff (90 F. Supp. 681). On November 8, 1951, the United States Court of Appeals for the District of Columbia Circuit reversed the conviction of the defendant Association, holding that there was no evidence to support many other of said allegations (193 F. 2d 907). To the extent that the matters, facts and things set forth in the amended complaint herein have been judicially determined adversely to the plaintiff, the plaintiff is estopped by judgment, directly and collaterally, from relitigating them as bases upon which relief can be granted.

Ninth Defense:

39. In a criminal action instituted in this Court by the plaintiff herein against defendant herein, and another, on October 12, 1955, entitled United States of America v. Mary-

land Cooperative Milk Producers, Inc., et al., Criminal No. 992-55, the Association was charged with violations of the antitrust laws predicated on some of the same alleged acts, transactions, courses of conduct and effects which are embraced by the amended complaint herein. On October 16, 1956, this Court determined that the matters alleged therein were not unlawful and that the Association was exempt and immune from the antitrust laws in respect thereof (145 F. Supp. 151). There has been a judicial determination adverse to the plaintiff in respect of the matters, facts and things embraced by Criminal Action No. 992-55, and the plaintiff is estopped by judgment, directly and [fol. 1707] collaterally, from relitigating them as bases upon which relief can be granted.

Wherefore defendant Maryland and Virginia Milk Producers Association, Incorporated, prays judgment dismissing the amended complaint herein.

William J. Hughes, Jr., 821 15th Street, N. W., Washington 6, D. C.; Herbert A. Bergson, World Center Building, Washington 6, D. C., Attorneys for Defendant.

Of Counsel: Bergson & Borkland, World Center Building, Washington 6, D. C.

Filed: February 18, 1957

Acknowledgment of Service (omitted in printing).

[fol. 1708] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

STATEMENT OF PARTICULARS—Filed November 1, 1957

Pursuant to instruction of the Court given at pre-trial conference on October 1, 1957, plaintiff United States of America furnishes herein the particulars concerning alleged

acts, practices and courses of conduct of defendant constituting the offenses charged in paragraph 22 of the amended complaint heretofore filed in this proceeding. Since plaintiff has not completed its pre-trial discovery, the following particularization includes only such alleged acts, practices and courses of conduct as are known to plaintiff at the time of submission of this statement.

Paragraph 22

Subparagraph a.:

Defendant has fixed and maintained arbitrary and noncompetitive prices and terms of sale for milk by:

1. Maintaining a policy of requiring or attempting to require dealer-customers to take full requirements a a condition to the sale of milk.

2. Refusing to sell milk to High's Dairy, Washington, D. C., in or about the period 1935-1940, on the grounds that said High's Dairy sold or proposed to sell milk at prices below those charged by other Washington area dealers.

[fol. 1709] 3. Maintaining a policy of establishing and charging dealer-customers higher prices for milk purchased for resale in the Washington metropolitan area and lower prices for milk purchased for resale outside the Washington metropolitan area, in or about the period 1950-1957.

4. Maintaining a policy of requiring dealer-customers to take minimum daily quantities of milk or to pay for such minimum daily quantities if not taken.

5. Requiring or attempting to require Fairfax Farms Dairy to purchase its full requirements of milk from defendant as a condition to the sale of milk to Embassy Dairy, Inc., following the purchase of Fairfax Farms Dairy in or about 1938 by James J. Ward and related interests.

6. Requiring in the calculation of milk charges in or about the period 1947 to 1952 that milk obtained by dealer-customers from other suppliers in periods of shortage be given lowest classifications while milk supplied by defendant be given highest classifications, regardless of actual utilization of milk from the various sources.

7. Refusing to sell cream to Wakefield-Model Farms Dairy in or about 1954 other than in a ratio to purchases of milk.

8. Maintaining a policy of requiring dealer-customers to pay at Class I price for all amounts of milk of which any component is used in Class I despite the use of other components thereof in classes other than Class I, although defendant purports to price milk upon a classification-utilization basis.

9. Maintaining a policy of arbitrarily pricing milk supplied dealer-customers for resale as fluid milk on government contracts at prices often substantially below prevailing classification prices.

10. Classifying pro rata among the various classifications milk supplied by defendant and milk supplied by others, in calculating charges for milk supplied dealer-customers.

[fol. 1710] 11. Arbitrarily and secretly deviating on sales of milk to Chestnut Farms Dairy in or about the period 1950 to 1956 from an announced policy of selling milk on a classification-utilization pricing basis, and of "pro-rating" in the classification of milk supplied to dealer-customers which was commingled by the latter with milk from other suppliers.

12. Offering to sell and selling milk at prices below prevailing classification prices to "cooperating" dealer-customers for use in taking business away from "non-cooperating" dealers, in or about the period 1938 to 1940.

13. Offering to sell and selling milk to dealer-customers for resale as fluid milk to certain schools in Montgomery and Prince Georges Counties, Maryland, at prices substantially below the prices at which defendant supplied milk to dealer-customers for resale as fluid milk to schools in the District of Columbia and to other schools in said counties.

14. Maintaining a policy of exacting high and arbitrary prices for milk sold to dealers for resale as fluid milk.

Subparagraph b.:

Defendant has excluded, eliminated, and attempted to eliminate others, including producers and producers' agricultural cooperative associations not affiliated with defendant, from supplying milk to dealers by:

1. Maintaining a policy of requiring or attempting to require dealer-customers to obtain their full requirements of milk from defendant.

2. Effecting agreements in or about the period 1933 to 1950 by which dealer-customers who distributed the bulk of wholesale and retail fluid milk in the Washington area were contemporaneously obligated to take full requirements from defendant.

3. Opposing acceptance of chemical sterilization techniques in the Washington milk market, in or about the period 1936 to 1951, in order to limit the supplying of milk for resale as fluid milk in the Washington metropolitan area to producers utilizing steam sterilization techniques.

[fol. 1711] 4. Maintaining a policy of requiring dealer-customers to take minimum daily quantities of milk or to pay for such minimum daily quantities if not taken.

5. Requiring or attempting to require, as a condition to the sale of milk to Fairfax Farms Dairy or Embassy Dairy, Inc., in or about the period 1938 to 1940, that Fairfax Farms Dairy purchase its full requirements of milk from defendant, purchase part of its requirements from defendant and not engage to purchase milk from producers or suppliers in addition to those other producers or suppliers from whom Fairfax Farms was then purchasing, or arrange for producers supplying Fairfax Farms to terminate their independent status and become members of defendant association.

6. Requiring or attempting to require, as a condition to the sale of milk to Embassy-Fairfax Dairy, in or about the period 1939 to 1942, that Embassy-Fairfax purchase its full requirements of milk from defendant, not undertake to purchase milk from producers or suppliers in addition to those other producers or suppliers from whom Em-

bassy-Fairfax was then purchasing, or arrange for producers supplying Embassy-Fairfax to terminate their independent status and become members of defendant association.

7. Attempting to arrange with James J. Ward that producers supplying milk to Embassy-Fairfax Dairy, Inc., would be "switched" to the Baltimore market in or about the period 1940 to 1942.

8. Attempting to prevent or interfere with the shipment of milk to the Washington area market by producers not members of defendant association, particularly by attempting to prevent or interfere with

(a) the transportation of milk of non-member farmers on the truck of Henry Beatty, of Verona, Virginia, in or about 1938;

(b) the transportation of milk of one John M. Musselman, Remington, Virginia, upon the truck of one E. C. Shaw, a milk hauler, in or about 1955;

[fol. 1712] (c) the transportation of milk of non-member farmers by one H. R. Ennis, Catlett, Virginia, in or about 1956.

9. Activities in or about 1953 to exclude Valley of Virginia Milk Producers Association as a supplier of milk to Alexandria Dairy Products Company.

10. Activities in or about 1953 to exclude Valley of Virginia Milk Producers Association as a supplier of Milk in Manassas, Virginia, area and to foreclose use of Birmingham Dairy, which Valley of Virginia sought to acquire, as an outlet for milk produced by members of Valley of Virginia.

11. Activities in or about 1953 to interfere with the supplying of milk to Coble Dairy Products Company, Lexington, North Carolina, for resale by Coble as fluid milk on government milk supply contracts, particularly contracts in and around Norfolk, Virginia.

12. Attempting to purchase the business of Harvey Dairy, Inc., Brentwood, Maryland, in or about April, 1954.

13. Activities in or about 1953 to bar the establishment by Embassy Dairy, Inc., of a distribution plant in Fairfax, Virginia.

14. Acquiring the assets of Embassy Dairy, Inc., Washington, D. C., in 1954, and arranging for the diversion from the Washington market or absorption into defendant association of milk producers who supplied Embassy as independent sellers of milk, and foreclosing from the Washington market of other suppliers of milk who also furnished milk to Embassy.

Subparagraph c.:

Defendant has effected agreements with suppliers of milk, including agricultural cooperative associations, to eliminate competition between said suppliers and the defendant or to regulate the terms or conditions under which said suppliers would compete with defendant by:

1. Effecting agreement or agreements with Maryland Cooperative Milk Producers, Inc., concerning prices at which defendant and Maryland Cooperative Milk Producers, Inc., would sell milk to dealers for resale to or at Fort Meade, Maryland, in or about the period 1952 to 1956.

[fol. 1713] Subparagraph d.:

Defendant has acquired and attempted to acquire dealer and manufacturing outlets by threats, inducements and other diverse means by:

1. Acquiring Holbrook Farms Dairy in or about 1941.

2. Acquiring assets of Embassy Dairy, Inc., in or about 1954, by threat of action to obtain federal marketing order and by inducement of excessively high purchase price.

3. Attempting to acquire Harvey Dairy, Inc., in or about 1954, by offering to pay Sam Harvey, then owner of Harvey Dairy, Inc., $25,000 more than he had been offered by any other potential purchaser, said offer being made without knowledge of the highest price theretofore offered and at a time when sale of said Harvey Dairy, Inc., to others had already been negotiated.

4. Acquiring Olney Acres Manufacturing Plant, Laurel, Maryland, in or about 1955.

Subparagraph e.:

Defendant has threatened and undertaken diverse actions to induce or compel dealers to purchase milk from defendant, and induced and assisted others to acquire dealer outlets purchasing milk from producers not affiliated with the defendant by:

1. Policy of utilizing contemporaneous full-supply contracts with dealers who distributed the bulk of wholesale and retail fluid milk in Washington area.

2. Obligating Richfield Dairy Corporation to purchase milk by using the leverage of Richfield's indebtedness to defendant.

3. Offering and agreeing to supply Holbrook Farms Dairy with milk on a flat price basis in or about 1939 in contravention of policy of defendant that dealer-customers pay for milk on classification basis, in order to obtain full-supply contract with Holbrook and cause Holbrook to relinquish connections with independent producers.

[fol. 1714] 4. Threatening Harvey Dairy with action to secure federal marketing order in 1954 after Harvey notified defendant of intention to cease purchasing full requirements of milk from defendant.

5. Policy of requiring dealer-customers to take minimum daily quantities of milk or to pay for such minimum daily quantities if not taken.

6. Refusing in or about the period 1938-1939, to supply Embassy Dairy, Inc., unless Fairfax Farms Dairy also purchased its supply of milk from the defendant.

7. Making or offering to make loans to dealer-customers.

8. Inducing and assisting stockholders of Richfield Dairy Corporation to acquire control of Simpson Bros., Inc., trading as Wakefield Model Farms Dairy, in or about 1955.

9. Obtaining mortgages on properties of various dealer-customers, including, but not limited to, Lee Dairy, Wakefield Dairy, Holbrook Farms Dairy and Richfield Dairy.

10. Attempting to instigate action by District of Columbia authorities, in or about the period 1950 to 1954, to bar importation of milk produced on farms not inspected by D. C. Health Department.

11. Requiring as a condition of sale of milk and/or cream to Ralph Torreyson, a broker, for resale to ice cream plants, in or about 1954-1955, that Harvey Dairy, Inc., with which Torreyson was connected as an officer and/or stockholder, purchase from defendant milk for resale as fluid milk.

12. Requiring as a condition of sale of milk to Simpson Bros., Inc., (Wakefield Dairy), in or about 1957, that Richfield Dairy Corporation also purchase milk from defendant.

13. Threatening and inducing a boycott by dairy farmer-members of defendant of feed and farm supply outlets owned by one Herbert Bryant, in or about 1956, in order to compel Eastern Dairy Products Corporation of Alex-[fol. 1715] andria, Virginia, also owned by said Bryant, to purchase from defendant milk for resale as fluid milk.

Subparagraph f.:

Defendant has required dealers to take full requirements of milk from defendant or penalized dealers failing or refusing to do so by:

1. Policy of utilizing contemporaneous full-supply contracts with dealers who distributed the bulk of wholesale and retail fluid milk in the Washington area.

2. Policy of requiring dealer-customers to take minimum daily quantities of milk or to pay for such minimum daily quantities if not taken.

3. Refusing or declining to advise, or avoiding advising Wakefield Dairy, a dealer-customer not taking full requirements from defendant, of the availability in or about 1954 of milk at reduced prices for resale to government installations.

4. Refusing in or about 1954 to sell cream to Wakefield Dairy other than in a ratio to purchases of milk.

5. Selling cream on a milk equivalent basis to dealer-customers not purchasing full requirements from defen-

dant while contemporaneously selling cream at cream market prices to full supply dealer-customers and other purchasers in or about 1954.

6. Requiring dealer-customers not purchasing full requirements from defendant to pay handling charges on cans in cream purchases in or about 1953 and 1954, while contemporaneously selling cream to full supply dealer-customers and other purchasers without requiring payment of can handling charges.

7. Requiring or attempting to require Fairfax Farms Dairy, Embassy-Fairfax Dairy, Inc., and Embassy Dairy, Inc., to purchase full requirements of milk as a condition to sale of any milk in or about the period 1938 to 1942.

[fol. 1716] 8. Refusing in or about 1941 to sell milk to John M. Seibel except on basis of full-supply contract.

9. Requiring Eastern Dairy Products Corporation to purchase all milk for resale as fluid milk from defendant or to pay the Class I price for quantities less than its full requirements obtained from defendant, despite utilization of such milk by Eastern for fluid uses for which defendant had announced prices lower than the prevailing Class I price, in or about 1956.

10. Policy of pro-rating credit adjustments for milk sold to Thompson's Dairy and Wakefield Dairy and resold by said dealers as fluid milk on government contracts or in fringe areas for which prices lower than prevailing Class I prices were established, in or about the period 1950 to 1957.

Subparagraph g.:

Defendant has threatened and engaged in predatory pricing by:

1. Selling milk to dealer-customers in the Washington area at reduced prices in order to "break" Embassy Dairy, Inc., and threatening to continue to do so, as admitted, at Staunton, Virginia, in or about 1938.

2. Offering to sell and selling milk below prevailing prices to "cooperating" dealer-customers for use in taking

business away from "non-operating" dealers, in or about the period 1938 to 1940.

3. Threatening James J. Ward, in or about 1938, that unless Embassy Dairy, Inc., and/or Fairfax Farms Dairy purchased milk from defendant, defendant would offer to sell and sell milk to dealer-customers below prevailing prices for use in taking business away from Embassy and/or Fairfax.

[fol. 1717] 4. Threatening in or about January 1955, to reduce prices of milk offered to dealer-customers for resale on government contracts in order to prevent Harvey Dairy, Inc., from successfully competing for such contracts in or about 1954 and 1955.

5. Bidding for and securing through defendant's Embassy Division the milk supply contract covering requirements of U.S. Army installations comprising the entire Military District of Washington (Fort Belvoir, Walter Reed Army Medical Center, Fort Myer, Fort McNair, Cameron Station and Vint Hill Farms Station) during the months of April, May and June, 1955, and promptly assigning without recompense the supplying of certain of said installations to other dealer-customers of defendant (Alexandria Dairy and Birmingham Dairy) after having told Harvey Dairy, Inc., that the contract to supply Fort Belvoir obtained by Harvey in the preceding contract period would be the last contract that Harvey would secure.

6. Reducing prices for milk sold to dealer-customers for resale on government contracts substantially below the prices maintained and charged for milk of identical grade and quality utilized by dealer-customers in other sales, in or about the period 1950 to 1957.

7. Charging prices for milk resold as fluid milk outside the Washington metropolitan area lower than those contemporaneously charged for milk resold as fluid milk in said area, in or about the period 1950 to 1957.

8. Charging prices for milk resold as fluid milk in areas outside the Washington metropolitan area lower than those contemporaneously charged for milk resold as fluid milk

in the Washington metropolitan area, which lower prices were also substantially below generally prevailing prices for milk sold for resale as fluid milk in said areas.

Subparagraph h.:

Defendant has practiced manifold discriminations among dealers purchasing milk from defendant by:

[fol. 1718] 1. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at U.S. Soldiers Home, Washington, D. C., in February and March, 1950, although such resale was not specified in defendant's notice to dealer-customers, dated December 7, 1949, as a utilization for which defendant would supply milk at reduced prices.

2. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at U.S. Soldiers Home, Washington, D. C., in April, May and June, 1950, although such resale was not specified in defendant's notice to dealer-customers, dated February 16, 1950, as a utilization for which defendant would supply milk at reduced prices.

3. Sellling milk at reduced prices to Chestnut Farms Dairy for resale to or at Naval Powder Factory (Naval Barracks) Indian Head, Maryland, in July, August and September, 1950, although defendant's notice to dealer-customers, dated June 5, 1950, specifically limited the availability of milk at reduced prices for utilization in supplying naval installations to those installations located solely within the Washington metropolitan area.

4. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at U.S. Soldiers Home, Washington, D. C. in August and September, 1950, although such resale was not specified in defendant's notice to dealer-customers, dated June 5, 1950, as a utilization for which defendant would supply milk at reduced prices.

5. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Camp Detrick, Maryland, in September, 1950, although such resale was not specified in defendant's notice to dealer-customers, dated June 5, 1950, as a utilization for which defendant would supply milk at reduced prices.

[fol. 1719] 6. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Camp Detrick, Maryland, in October, November and December, 1950, although such resale was not specified in defendant's notice to dealer-customers, dated September 8, 1950, as a utilization for which defendant would supply milk at reduced prices.

7. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Naval Installations, Norfolk, Virginia, in October, November and December, 1950, although such resale was not specified in defendant's notice to dealer-customers, dated September 8, 1950, as a utilization for which defendant would supply milk at reduced prices.

8. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Naval Radio Station, Cheltenham, Maryland, in October, November and December, 1950, although such resale was not specified in defendant's notice to dealer-customers, dated September 8, 1950, as a utilization for which defendant would supply milk at reduced prices.

9. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Quartermaster Depot, Alexandria, Virginia, in November and December, 1950, although such resale was not specified in defendant't notice to dealer-customers, dated September 8, 1950, as a utilization for which defendant would supply milk at reduced prices.

10. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Vint Hill Farms Station, Warrenton, Virginia, in November and December, 1950, although such resale was not specified in defendant's notice to dealer-customers, dated September 8, 1950, as a utilization for which defendant would supply milk at reduced prices.

11. Not selling milk to Thompson's Dairy for resale on penny milk program during January, February and March, 1950, at prices below regular classification prices, although notice from defendant to dealer-customers, dated December 7, 1949, stated that defendant would supply milk for resale on penny milk program in said months at reduced prices.

[fol. 1720] 12. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Camp Lejeune, North Carolina, in January, February and March, 1951, although such resale was not specified in defendant's notification to dealer-customers, given on December 7, 1950, as a utilization for which defendant would supply milk at reduced prices.

13. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Marine Corps Base, Parris Island, South Carolina, in January, February and March, 1951, although such resale was not specified in defendant's notification to dealer-customers, given on December 7, 1950, as a utilization for which defendant would supply milk at reduced prices.

14. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Naval Air Station, (Cedar Point) Patuxent River, Maryland, in January, February and March, 1951, although such resale was not specified in defendant's notification to dealer-customers, given December 7, 1950, as a utilization for which defendant would supply milk at reduced prices.

15. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Marine Corps Air Station, Cherry Point, North Carolina, in January, February and March, 1951, although such resale was not specified in defendant's notification to dealer-customers, given on December 7, 1950, as a utilization for which defendant would supply milk at reduced prices.

16. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Camp Detrick, Maryland, in January, February and March, 1951, although such resale was not specified in defendant's notification to dealer-customers, given on Deeember 7, 1950, as a utilization for which defendant would supply milk at reduced prices.

[fol. 1721] 17. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Naval Powder Factory (Naval Barracks), Indian Head, Maryland, in January, February and March, 1951, although such resale was not specified in defendant's notification to dealer-customers,

given on December 7, 1950, as a utilization for which defendant would supply milk at reduced prices.

18. Continuing to sell milk at former Class I price to Chestnut Farms Dairy for resale on government contract (U.S. Naval Hospital, Bethesda, Maryland) in January, February and March, 1951, following increase in Class I price effective on or about January 21, 1951, while other dealers were charged and paid the higher Class I price for milk resold on government contracts in same period.

19. Selling milk at reduced prices to Chestnut Farms Dairy for resale on military frozen milk and/or concentrated milk contracts in October, November and December, 1952, although defendant announced on or about September 15, 1952, that, with the exception of milk resold by dealer-customers to A. P. Hill and Vint Hill military installations, regular Class I prices would prevail in said months.

20. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at U.S. Naval Air Station, Patuxent River, Maryland, in October, November and December, 1952, although defendant announced on or about September 15, 1952, that, with the exception of milk resold by dealer-customers to A. P. Hill and Vint Hill military installations, regular Class I prices would prevail in said months.

21. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Naval Powder Factory, Indian Head, Maryland, in October, November and December, 1952, although defendant announced on or about September 15, 1952, that, with the exception of milk resold by dealer-customers to A. P. Hill and Vint Hill military installations, regular Class I prices would prevail in said months.

[fol. 1722] 22. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Camp Detrick, Maryland, in October, November and December, 1952, although defendant announced on or about September 15, 1952, that, with the exception of A. P. Hill and Vint Hill military installations, regular Class I prices would prevail in said months.

23. Selling milk at reduced prices to Chestnut Farms Dairy for resale to or at Warrenton Training Center, Warrenton, Virginia, in October, November and December, 1952, although defendant announced on or about September 15, 1952, that, with the exception of A. P. Hill and Vint Hill military installations, regular Class I prices would prevail in said months.

24. Selling milk at prices varying from $3.75 to $5.20 per cwt. to Chestnut Farms Dairy for resale on military frozen milk and/or concentrated milk contracts in January, February and March, 1953, although defendant announced on or about November 25, 1952, that the price for milk supplied to dealer-customers for resale on military contracts in said months would be $5.60 per cwt.

25. Selling milk at price of $3.80 per cwt. to Chestnut Farms Dairy for resale to or at Camp Ritchie, Maryland, in April 1953, although defendant announced to dealer-customers on or about February 16, 1953, that the price for milk supplied dealer-customers for resale on military contracts at installations "north of Camp Meade," Maryland, in the months of April, May and June, 1953, would be $4.00 per cwt.

26. Selling milk at price of $3.80 per cwt. to Chestnut Farms Dairy for resale to or at Camp Detrick, Maryland, in April and May, 1953, although defendant announced to dealer-customers on or about February 16, 1953, that the price for milk supplied dealer-customers for resale on military contracts at installations "north of Camp Meade," Maryland, in the months of April, May and June, 1953, would be $4.00 per cwt.

[fol 1723] 27. Selling milk at price of $3.60 per cwt. to Chestnut Farms Dairy for resale to or at Camp Detrick, Maryland, in July, 1953, although defendant established and announced on or about May 26, 1953, that the price for milk supplied dealer-customers for resale in July, August and September, 1953, to or at military installations, except those at Norfolk, Virginia, would be $4.00 per cwt.

28. Selling milk at price of $3.60 per cwt. to Chestnut Farms Dairy for resale to or at Naval Powder Factory

(Naval Barracks), Indian Head, Maryland, in July 1953, although defendant established and announced on or about May 26, 1953, that the price for milk supplied dealer-customers for resale in July, August and September, 1953, to or at military installations, except those at Norfolk, Virginia, would be $4.00 per cwt.

29. Selling milk at price of $3.60 per cwt. to Chestnut Farms Dairy for resale to or at Vint Hill Farms Station, Warrenton, Virginia, in July 1953, although defendant established and announced on or about May 26, 1953, that the price for milk supplied dealer-customers for resale in July, August, and September, 1953, to or at military installations, except those at Norfolk, Virginia, would be $4.00 per cwt.

30. Selling milk at price of $3.60 per cwt. to Chestnut Farms Dairy for resale to or at U.S. Naval Air Station, Patuxent River, Maryland, in July 1953, although defendant established and announced on or about May 26, 1953, that the price for milk supplied dealer-customers for resale in July, August and September, 1953, to or at military installations, except those at Norfolk, Virginia, would be $4.00 per cwt.

31. Selling milk at price of $3.60 per cwt. to Chestnut Farms Dairy for resale to or at U.S. Naval Proving Grounds, Dahlgren, Virginia, in July, 1953, although defendant established and announced on or about May 26, 1953, that the price for milk supplied dealer-customers for [fol. 1724] resale in July, August and September, 1953, to or at military installation, except those at Norfolk, Virginia, would be $4.00 per cwt.

32. Offering to sell milk at price of $2.00 per cwt. to Chestnut Farms Dairy for resale to or at Marine Corps Air Station, Cherry Point, North Carolina; Marine Corps Base, Camp Lejeune, North Carolina; and/or Marine Recruiting Depot, Parris Island, South Carolina, in April, May and June, 1954, and selling milk at $2.00 per cwt. to said Chestnut for resale to or at Camp Lejeune, North Carolina, in said months although defendant did not offer other dealer-customers milk for resale to or at said installations at so low a price.

33. Selling milk at price of $2.50 per cwt. to Chestnut Farms Dairy for resale to or at U.S. Naval Air Station, Patuxent River, Maryland, in July, August and September, 1954, although defendant did not offer other dealer-customers milk for such resale at so low a price.

34. Selling milk at price of $2.50 per cwt. to Chestnut Farms Dairy for resale to or at Veterans Administration (Mt. Alto) Hospital, Washington, D. C., in July, August and September, 1954, although defendant did not offer other dealer-customers milk for such resale at so low a price.

35. Selling milk at price of $6.17 per cwt. to Chestnut Farms Dairy for resale to or at Veterans Administration (Mt. Alto) Hospital, Washington, D. C., in October, November and December, 1954, although defendant did not offer other dealer-customers milk for such resale at so low a price.

36. Selling milk at price of $6.17 per cwt. to Chestnut Farms Dairy for resale to or at the canteen located on the premises of Veterans Administration (Mt. Alto) Hospital, Washington, D. C., in October, November and December, 1954, although, according to defendant's stated policy, the prevailing Class I price was applicable to such sale.

[fol. 1725] 37. Selling milk at price of $6.17 per cwt. to Chestnut Farms Dairy for resale to or at National Institutes of Health, Bethesda, Maryland, in October, November and December, 1954, although defendant neither offered nor supplied other dealer-customers milk for such resale at so low a price.

38. Selling milk at price of $6.17 per cwt. to Chestnut Farms Dairy for resale to or at St. Elizabeths Hospital, Washington, D. C., in October, 1954, although defendant did not offer other dealer-customers milk for such resale at so low a price.

39. Selling milk at price of $6.17 per cwt. to Chestnut Farms Dairy for resale to or at St. Elizabeths Hospital in November, 1954, although defendant did not offer other dealer-customers milk for such resale at so low a price.

40. Selling milk at price of $6.17 per cwt. to Chestnut Farms Dairy for resale to or at Walter Reed Army Medical Center, Washington, D. C., in November and December, 1954, although defendant neither offered nor supplied other dealer-customers milk for such resale at so low a price.

41. Establishing of "confidential and must not be released" price for milk supplied Chestnut Farms Dairy for resale to or at Norfolk Naval Base in July, August and September, 1953.

42. Selling milk at price of $4.50 per cwt. to Chestnut Farms Dairy, for resale to or at MacKensie Hall, Sports Bar, Pines Club, Woodlawn Hall, and L-4 at Fort Belvior, Virginia, in May and June 1954, although defendant specifically affirmed on or about March 18, 1954, the prevailing Class I price would apply to resale to officers messes, PX, or commissaries.

43. Differentiating between customers with respect to prices charged for milk resold to commissaries and special messes at military installations:

[fol. 1726] a) Selling milk at contract price to Chestnut Farms Dairy for resale to or at Commissary Store, Chief Petty Officers' Mess, Officers' Club Mess, and Navy Wives Welfare, U.S. Naval Air Station, Patuxent River, Maryland; Navy Exchange, Naval Proving Grounds, Dahlgren, Virginia, in July and August, 1953, as compared with refusing to sell milk at contract price to Wakefield Dairy for resale to or at commissary at Walter Reed Medical Center, Washington, D. C., in said months;

b) Selling milk at contract price to Chestnut Farms Dairy for resale to or at Chief Petty Officers' Mess, U.S. Naval Air Station, Patuxent River, Maryland, in July, August, September, October, November, December, 1953, January, February and March, 1954, but not selling milk at contract price to Richfield Dairy Corporation for resale to the same Chief Petty Officers' Mess in April, May and June, 1954.

44. Selling milk at price of $4.20 per cwt. to Chestnut Farms Dairy for resale to or at U.S. Army anti-aircraft installations around Washington, D. C., in July, August and September, 1955, although defendant did not offer other dealer-customers milk for such resale at so low a price.

45. Varying "pro-rating" policy in classification of milk: Milk purchased from defendant and milk purchased from other sources by dealer-customers purchasing less than full requirements from defendant, including Martin's Dairy, Thompson's Dairy and Wakefield Dairy, was classified pro rata among the various classifications, although milk purchased from defendant and milk purchased from other sources by Chestnut Farms Dairy was not so pro-rated, in or about the period 1951 to 1956.

[fol. 1727] 46. Falsifying utilization of milk by Chestnut Farms Dairy in or about the period 1951 to 1953, by classifying milk utilized by Chestnut in Class III as having been utilized in Class I, such milk having been obtained by Chestnut at lower prices from sources other than defendant, thus giving Chestnut advantages not accorded other dealer-customers.

47. Varying "pro-rating" policy as to contract and fringe sales: Allowing Thompson's Dairy and Wakefield Dairy only pro-rata credit adjustments on contract and fringe sales, while not pro-rating contract and fringe credit adjustments to Chestnut Farms Dairy in or about the period 1951 to 1956.

48. Varying "pro-rating" policy as to "Dairy Month" sales: Allowing Wakefield Dairy only pro-rata credit adjustments on increased buttermilk sales, while not pro-rating credits for increased buttermilk sales by Chestnut Farms Dairy in or about June, 1951, June, 1954.

49. Discriminating among dealer-customers in tank milk delivery, in or about the period 1953 to 1957.

50. Selling milk to Chestnut Farms Dairy and Lucerne Milk Company for resale in Culpepper fringe area at prices lower than those at which defendant sold milk to Thomp-

son's Dairy, Lone Pine Dairy and Loudoun Farms Dairy for resale in said area, in or about the period 1953 to 1955.

51. Selling approximately 4 million pounds of Class I milk to Embassy Dairy, Inc., in July, 1954, at price of approximately $4.70 per cwt. plus premiums, although defendant's announced Class I price for said month was $5.99 plus premiums (July 1-15) or $6.22 plus premiums (July 16-31) and other dealer-customers were charged and paid said higher prices for Class I milk utilized by them in said month.

[fol. 1728] 52. Selling cream to dealer-customers and other purchasers at cream prices, while requiring certain dealer-customers to pay for cream at higher "milk equivalent" prices, in or about the period October, 1954 to February, 1955.

53. Discriminating among dealer-customers in skim milk value charges or credits in or about 1953.

54. Discriminating among dealer-customers in skim milk handling charges or credits in or about 1953.

55. Discriminating among dealer-customers in charges for handling 10 gallon cans of 40% equivalent cream in or about the period 1953-1954.

56. Limiting cream purchases by Wakefield Dairy to a ratio of milk purchases, although no such limitation was imposed on other dealer-customers or other purchasers, in or about 1954.

57. Refusing or avoiding cooperation with Embassy Dairy, Inc., and Thompson's Dairy, Inc., in their proposed establishment of country receiving stations, while cooperating with Chestnut Farms Dairy in the maintenance and operation of its receiving station at Frederick, Maryland, in or about the period 1930 to 1940.

58. Refusing or avoiding notification to Wakefield Dairy of prices at which milk would be supplied by defendant for resale on government contracts in or about 1954, while notifying other dealer-customers of such prices.

[fol. 1729] Subparagraph i.:

Defendant has sought, urged and/or opposed action by governmental agencies for the purpose of excluding or eliminating competition by:

1. Opposing, in or about the period 1936 to 1951, adoption by District of Columbia authorities of regulations permitting chemical sterilization of milking equipment, in order to prevent shipment of milk into the Washington metropolitan area by milk producers not utilizing steam for sterilization.

2. Attempting to instigate action by District of Columbia authorities, in or about the period 1950 to 1954, to bar importation of milk produced on farms not inspected by D. C. Health Department.

3. Appearing before the Planning Commission for the Town of Fairfax, Virginia, in 1953, in active opposition to the application of Embassy Dairy, Inc., for rezoning of certain real property for intended commercial use as a distribution plant although defendant owned no property in the Town of Fairfax and admitted its objective of "keeping [Embassy] out of Virginia."

4. Appearing before the Town Council of the Town of Fairfax, Virginia, in 1953, in active opposition to the application of Embassy Dairy, Inc., for rezoning of certain real property for intended commercial use as a distribution plant and asserting that its purpose in doing so was "to keep Embassy Dairy out."

5. Urging Administrator of New York Milk Marketing Order in 1953 to rescind I-C pricing provision of New York Marketing Order applicable to milk utilized outside the New York marketing area, which milk competed with milk of defendant in sales to dealers for resale on government contracts, and characterizing as a "fraud upon consumers" [fol. 1730] the prescribed pricing of milk according to point of use, although defendant itself priced milk on such basis.

6. Applying to Virginia Milk Commission in 1953 for the establishment of priorities for members of defendant

supplying Birmingham Dairy, Manassas, Virginia, at the time when defendant knew that negotiations for the sale thereof to Valley of Virginia Cooperative Milk Producers Association, Harrisonburg, Virginia, were being conducted by owners of said Birmingham Dairy.

Subparagraph j.:

Defendant has established and charged dealers higher prices for milk purchased for resale in the Washington metropolitan area and lower prices for milk purchased for resale outside the Washington metropolitan area by:

1. Maintaining and charging Class I prices ranging from approximately $6.40 per cwt. to approximately $6.60 per cwt. for milk supplied dealer-customers for resale within the Washington metropolitan area, while selling milk to dealer-customers for resale as fluid milk in certain designated "fringe areas" at prices ranging from approximately $4.88 per cwt. to approximately $6.17 per cwt., in or about the period 1953 to 1957.

2. Maintaining and charging Class I prices ranging from approximately $6.40 per cwt. to approximately $6.60 per cwt. for milk supplied dealer-customers for resale within the Washington metropolitan area, while selling milk at prices below said Class I prices, and as low as approximately $2.00 per cwt., to dealer-customers and other purchasers for resale as fluid milk on government contracts outside the Washington metropolitan area and "fringe areas," in or about the period 1950 to 1957.

[fol. 1731] 3. Maintaining and charging Class I prices ranging from approximately $6.40 per cwt. to approximately $6.60 per cwt. for milk supplied dealer-customers for resale within the Washington metropolitan area, while selling milk at prices below said Class I prices to purchasers located outside the Washington metropolitan area and "fringe areas" for resale as fluid milk, in or about the period 1950 to 1957.

Subparagraph k.:

Defendant has eliminated and attempted to eliminate competition with its dealer-customers by dealers purchasing milk from others than defendant by:

1. Refusing to sell milk to High's Dairy, Washington, D. C., in or about the period 1935 to 1940, on the grounds that said High's Dairy sold and proposed to sell milk at retail prices below those charged by other Washington area dealers, who were customers of the defendant.

2. Acting to bar the establishment by Embassy Dairy, Inc., of a distribution plant in Fairfax, Virginia, in or about 1953.

3. Offering to sell and selling milk at prices below prevailing classification-utilization prices to "cooperating" dealer-customers for use in taking business away from "non-cooperating" dealers in or about the period 1938-1940.

4. Acquiring the assets of Embassy Dairy, Inc., in 1954.

5. Threatening Harvey Dairy, Inc., with action to secure a federal milk marketing order "to bring Harvey into line" and to drive down price of milk for government contracts to prevent Harvey from obtaining such contracts in or about 1954 and 1955.

6. Threatening retaliation if Wakefield Dairy succeeded in obtaining business held by other dealer-customers of defendant in or about 1955.

[fol. 1732] 7. Attempting to induce Holbrook Farms Dairy to raise retail prices for milk and cream, in or about the period 1938-1941.

8. Entering into agreements, in 1954, by which certain persons and corporations covenanted not to engage in the milk business in the Washington metropolitan area.

Subparagraph 1.:

[For convenient reference all particulars not within other subparagraphs of this paragraph 22 are set forth under this heading.]

1. In the course of making audits for the stated purpose of verifying the utilization of milk supplied dealers, defendant has obtained access to dealers' offices and business records, and has thereby secured information such as prices and sources of competing milk, dealers' selling prices and discounts, etc., and has unauthorizedly secured confidential information, such information giving defendant undue competitive advantages.

2. Contrary to defendant's policy of prohibiting the commingling of milk of its members and milk of non-members in tank trucks during transportation to market, defendant permitted an arrangement by which milk of Mark Turner, of Herndon, Virginia, who was not a member of defendant and whose milk was not marketed by defendant, to be commingled with milk of members of defendant for transportation to Chestnut Farms Dairy, Washington, D. C., in or about the period 1954 to 1956, when said Mark Turner was chairman of the Virginia Milk Commission.

3. Employing private detectives in or about the period 1937 to 1940 to spy upon dealers and to maintain surveillance of shipments of milk to dealer plants in the Washington metropolitan area.

4. Printing and distributing literature opposing legislation to permit the receipt of U.S. Public Health-inspected [fol. 1733] milk in District of Columbia dealer plants in the name of organizations not connected with the milk industry, in or about 1939.

Joseph J. Saunders, Edna Lingreen, J. E. Waters,
Attorneys, Department of Justice.

Certificate of Service (omitted in printing).

[fol. 1945] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

STIPULATION No. 1—Filed March 20, 1958

It is hereby stipulated and agreed by and between the United States of America and Maryland and Virginia Milk Producers Association Incorporated, by their attorneys, that each of the attached narrative statements of W. Gwynn Gardiner, Samuel H. Harvey and Arthur Lee Thompson may be offered by plaintiff and admitted in evidence at the trial of this cause and, when admitted in evidence, shall be entitled to the same force and effect as if the matters contained therein were testified to under oath upon direct and cross examination by the person whose testimony is set forth in such narrative statement, subject, however, to objections as to relevancy or materiality. By this stipulation the parties agree that each of said narrative statements may be offered and admitted in evidence regardless of availability of the person as a witness and notwithstanding unavailability, disability, death or other cause which would render it impossible for the person to be present at the trial to testify, and that, if the statement of any of said persons is offered and admitted, neither party may examine said person as to any testimony contained in such statement.

Joseph J. Saunders, Attorney for the United States.

Wm. J. Hughes, Jr., Attorney for Maryland and Virginia Milk Producers Association, Incorporated.

[fol. 1946] W. GWYNN GARDINER

The testimony of W. Gwynn Gardiner as to certain facts alleged to be relevant and material to the issues in the pending cause is as follows:

That he has been an attorney-at-law and member of the bar of the District of Columbia for many years. That, from some time in the 1920's until about 1957, he owned and operated several dairy farms which supplied milk to the Washington market and, during most or all of the period during which he owned and operated said farms, was a member of the Maryland and Virginia Milk Producers Association (hereinafter "the Association").

That he and/or his associates were legal counsel to Richfield Dairy Corporation from about 1936 to 1957. That, while acting as attorney for Richfield Dairy, he was called upon, during the approximate period 1937 to 1941, to assume quasi-managerial responsibilities at Richfield Dairy because of Richfield's financial difficulties.

That some time during the first six months of 1939, Messrs. Derrick and Hooper of the Association came to him for the purpose of discussing the sale of milk for resale by Richfield Dairy to the District of Columbia. That District of Columbia fluid milk contracts were awarded on a fiscal year basis and bids for the next fiscal year's contract were required to be submitted sometime prior to, or on or about, July 1, 1939.

That Messrs. Derrick and Hooper told him that they had agreed with, or had proposed to dealers buying milk from the Association to protect such dealers on any bid made by them for Government business, and that, if Richfield Dairy would make a bid low enough to get the contract from the dealer who had the contract in the fiscal year about to terminate, the Association would take care of any loss which Richfield Dairy might incur in obtaining [fol. 1947] or fulfilling the contract. That he believes that Embassy Dairy had the District of Columbia fluid milk contract at that time.

That Richfield Dairy was a full supply purchaser from the Association at the time of the above meeting with Messrs. Derrick and Hooper, and was purchasing milk under a full supply contract with the Association then in effect.

That he told Messrs. Derrick and Hooper that Richfield Dairy would submit a bid on the District of Columbia contract because Richfield was desperate for business. That

he knew that the District of Columbia contract involved a substantial volume of fluid milk.

That Mr. Derrick told him that if Richfield Dairy did make a low bid and succeeded in getting the contract, he (Derrick) would protect Richfield on any loss, as determined by the Association's auditors at the end of the contract year.

That the Association set a price for milk for the District of Columbia contract which was lower than the Association's prevailing price for milk for resale as fluid milk by dealers.

That Richfield Dairy's manager, after consulting with him, and with his knowledge and consent, submitted a bid on the District of Columbia contract and succeeded in making Richfield the low bidder. That the contract was awarded by the District of Columbia to Richfield Dairy.

That, on February 1, 1940, a milk marketing order administered by the Department of Agriculture became effective in the Washington metropolitan area and by terms of said order Richfield Dairy was required to pay a higher price for milk resold as fluid milk to the District of Columbia Government than was formerly the case. That, because of Richfield Dairy's contract with the District of Columbia, the said higher price for milk, if charged and collected by the Association, would have meant a loss to Richfield Dairy in excess of $10,600. That, under procedure established [fol. 1948] by the market order administrator, Richfield Dairy was held to be obligated to pay the higher price and was advised by the market order administrator to pay for the milk at the higher price. That he objected and informed the market order administrator of the agreement between Mr. Derrick and himself. That Mr. Derrick denied having made said agreement.

That the matter of the higher payment was in dispute for some time, that discussions were held between Mr. Hooper and himself for the purpose of settling the asserted obligation of Richfield Dairy to the Association, and that the Association eventually agreed to waive collection of the amount in dispute.

That in or about the year 1939, as a representative of Richfield Dairy, he had a conference with Mr. Derrick con-

cerning Richfield Dairy's cream purchases. That this was a period of substantial milk surpluses and that he attempted to get cream other than from the Association, because cream could be bought on the open market at prices substantially below the Association's cream price. That, according to his recollection, cream could be obtained on the open market from sources other than the Association at from 60 to 70 percent of the Association's selling price for cream.

That he asked Mr. Derrick if Richfield Dairy could not buy some cream on the open market as others were doing and that Mr. Derrick stated that other dealers were not buying cream on the open market, that he (Derrick) was having every dairy watched, that no cream other than from the Association was being delivered to any dealer purchasing from the Association, and that, if any such cream were delivered, he (Derrick) would know it, because he (Derrick) was having the dealers watched.

That, in this same period, the Association did not allow Richfield Dairy any discretion in determining how much milk it would receive each day from the Association. That [fol. 1949] Richfield was required to take a certain amount of milk, for the reason that there was a surplus, and that each dealer having a full supply contract with the Association was required to absorb a proportionate share of the surplus.

[fol. 1950] SAMUEL H. HARVEY

The testimony of Samuel H. Harvey as to certain facts alleged to be relevant and material to the issues in the pending cause is as follows:

That he organized Harvey Dairy, Inc., in 1927 and was for many years president, treasurer and manager of the milk distribution business operated under the name of Harvey Dairy, Inc., with office and plant in Hyattsville, Maryland, and, subsequently, in Brentwood, Maryland.

That, on behalf of Harvey Dairy, Inc., he signed a full supply contract with Maryland and Virginia Milk Producers Association (hereinafter "the Association") on or about May 1, 1946, that the said contract continued in effect until at least 1950.

That in a conversation or conversations with Mr. Derrick, secretary-treasurer of the Association, the exact date or dates of which are unknown but were within the period of the aforementioned full supply contract, he was told by Mr. Derrick that the Association had contracts of the same nature with other dealers in the Washington metropolitan area.

That, at the time Harvey Dairy entered into the aforementioned full supply contract with the Association, it was obtaining milk from approximately 40 independent producers of milk. The said contract with the Association contained a provision reserving the right to Harvey Dairy to continue to receive milk from such independent producers until December 31, 1946 because many of such producers had been supplying Harvey Dairy for many years and he desired to afford them ample opportunity to make other arrangements for the marketing of their milk.

That, on or about July 21, 1946, he directed a letter to each of the independent producers then supplying Harvey Dairy, advising them to find some other outlet for their milk prior to December 31, 1946 or to become members [fol. 1951] of the Association. That Harvey Dairy continued to receive milk from such independent producers until early 1947, but thereupon discontinued receiving milk from such suppliers and received milk only from the Association. That Harvey purchased its full requirements of milk from the Association from that time until August 1954.

That, about the beginning of the year 1954, he mentioned to Ralph Torreyson that he was interested in selling his interest in Harvey Dairy. That, in or about February 1954, Mr. Torreyson, and also Messrs. Dave Shank and Harvey Scott who were connected with Valley of Virginia Milk Producers Association, Harrisonburg, Virginia, put up a deposit in connection with an agreement for the purchase of the business of Harvey Dairy.

That, although he had not informed other persons, or even his employees, of the impending sale, William B. Hooper, assistant manager of the Association, contacted him by telephone in or about March 1954, shortly before the transfer of the business to the aforementioned purchasers was effected, that Mr. Hooper stated to him that

he (Hooper) was in a position to offer him $25,000 more for the Harvey business than had been offered by anyone else. That he had not informed Mr. Hooper or third persons of the proposed sale or the price involved, and that Mr. Hooper offered to top the proposed sale price, whatever it was, with an additional $25,000. That Mr. Hooper's offer was not accepted by him, and, on or about April 1, 1954, the control of Harvey Dairy passed largely to new stockholders, including Messrs. Shank, Torreyson and Scott, although he retained a nominal interest.

[fol. 1952] ARTHUR LEE THOMPSON

The testimony of Arthur Lee Thompson as to certain facts alleged to be relevant and material to issues in the pending cause is as follows:

That for many years he has been president, treasurer and principal stockholder of Thompson's Dairy, Inc., which has been engaged in the fluid milk distribution business in the Washington metropolitan area. That, since at least 1950, Thompson's Dairy has purchased most of its milk from Maryland and Virginia Milk Producers Association (hereinafter "the Association"), obtaining the remainder from independent producers.

That, in or about the period 1935-1939, the Association refused to cooperate with Thompson's in allowing Thompson's to establish a receiving station in Frederick County, Maryland, or elsewhere within the Association's production area. That he requested Mr. Derrick on frequent occasions, without success, to define the area of production which was sacred to Chestnut Farms, because Thompson's had had the experience, repeatedly, of agreeing to take the milk of certain producers and then having their milk diverted to the receiving station of Chestnut Farms Dairy; that he could never obtain a consistent statement of the Association's policy relative to receiving stations from Mr. Derrick, receiving only vague and varying explanations involving truck hauling conditions, road conditions, and other matters; that the Association would not agree to assign producers to deliver their milk to a Thompson's receiving station, in the event one were established by Thompson's.

That, in the first part of June 1954, he received a telephone call from B. B. Derrick, secretary-treasurer of the Association, who said he would like to come over to Thompson's with Mr. Hooper; that on or about June 11, 1954, Messrs. Derrick and Hooper came to his office at which time Mr. Hooper discussed the Association's plans to purchase the assets of Embassy Dairy, Inc., and stated that the [fol. 1953] Association expected to replace the milk which Mr. Ward had been buying with milk from Association members, that action by Thompson's to obtain the Embassy producers as shippers would queer the deal, that the Association's Embassy was not going to bid on Government contracts and the Association would not make reductions in prices to dealers for milk for government contracts as it had been doing, and that the Association's Embassy would gradually cease giving the discounts which Embassy Dairy, Inc., had been giving.

[fol. 1954] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

STIPULATION No. 2—Filed March 20, 1958

It is hereby stipulated and agreed by and between the United States of America and Maryland and Virginia Milk Producers Association, Incorporated, by their attorneys that, subject to objections as to relevancy or materiality:

1. Each of the parts of memoranda or reports written by officers and/or employees of the Baltimore Bank for Cooperatives, Baltimore, Maryland, which parts of memoranda or reports are described in the attached Exhibit 1 and contain information concerning meetings, conferences, visits and/or discussions with officers, agents or employees of Maryland and Virginia Milk Producers Association, Incorporated, and statements made or information furnished by said officers, agents or employees, may be offered and

received and read and used as evidence at the trial of this cause in lieu of testimony as to the above-described matters by the writer thereof, and the contents of any of said parts of memoranda or reports, when received in evidence, shall be entitled to the same force and effect as if the matters contained therein were testified to under oath upon direct examination.

2. Each of the said parts of memoranda or reports may be offered and received in evidence regardless of avail- [fol. 1955] ability of the writer thereof as a witness and notwithstanding unavailability, disability, death or other cause which would render it impossible for the writer thereof to be present at the trial to testify. Objection to the admissibility of any of said parts of memoranda or reports on the ground that the writer thereof has not been cross-examined as to matters contained therein or that, because of unavailability, disability, death or other cause, the writer thereof cannot be called at the trial for cross-examination as to such matters, is waived.

3. The right of either party to call as a witness the writer of any of the said described parts of memoranda or reports to testify in person as to matters referred to therein is reserved.

4. If any of the said described parts of memoranda or reports is offered by a party and received in evidence at the trial of this cause, the opposing party may call the writer thereof, for cross-examination as to matters contained within that part. If the writer is called for cross-examination, the rights of the parties to redirect and re-cross examination shall not be affected by this stipulation.

Joseph J. Saunders, Attorney for the United States.

Wm. J. Hughes, Jr., Attorney for Maryland and Virginia Milk Producers Association, Incorporated.

[fol. 1956] EXHIBIT 1 TO STIPULATION NO. 2

The following is a description of the parts of memoranda or reports of officers and/or employees of Baltimore Bank for Cooperatives, Baltimore, Maryland, referred to in the attached Stipulation No. 2. (Copies of the memoranda listed were marked by plaintiff on March 14, 1958 to indicate the parts referred to herein; these copies were delivered to defendant.)

1. Entire contents of Memorandum of April 16, 1954, by John B. Jones, Secretary.

2. Following described parts of Memorandum of Conference, April 23, 1954, by John B. Jones, Secretary: Page 1—Paragraph commencing "Messrs. B. B. Derrick" to end of page; Page 2—From top of page to paragraph ending "the Washington market."

3. Following described parts of Memorandum of Conference, May 17, 1954, by John B. Jones, Secretary: Page 1—Entire contents; Page 2—Postscript No. 2.

4. Following described part of Memorandum of Field Visit, May 26, 1954, by Jack R. Cobb, Assistant Treasurer: Page 1—Last paragraph.

5. Following described parts of Secretary's Report Concerning Application No. 1429, June 8, 1954, John B. Jones, Secretary: Page 5—Paragraph commencing "D. Proposal to Purchase Embassy Dairy, Inc." to end of page; Page 6—Entire contents; Page 7—Paragraph commencing "The Association has estimated" to end of page, excluding last paragraph.

6. Following described part of Memorandum of Office Conference, July 1, 1954, by Jack R. Cobb, Assistant Treasurer: Page 1—Paragraph commencing "As of today the association ... ."

7. Following described part of Memorandum of Field Visit, August 20, 1954, by Jack R. Cobb, Assistant Treasurer: Page 1—Part of Paragraph commencing "The association is generally" to and including "price discounting has disappeared from the Washington market."

[fol. 1957] 8. Following described part of Memorandum of Office Conference, October 4, 1954, by Jack R. Cobb, Assistant Treasurer: Page 1—Entire contents.

9. Following described part of Memorandum of February 15, 1955, by Jack R. Cobb, Assistant Treasurer: Page 3—Last paragraph.

[fol. 1960] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

SUPPLEMENT TO STATEMENT OF PARTICULARS—
Filed March 24, 1958

Plaintiff United States of America furnishes herein particulars as to acts, practices, and courses of conduct of defendant supplementary to those particulars previously furnished.

Include under Subparagraph h the following:

59. Selling milk at price of $4.00 per cwt. to Chestnut Farms Dairy for resale to or at Warrenton Training Center, Warrenton, Virginia, in October, November and December, 1953, although defendant had not established said price for milk supplied dealer-customers for resale to or at said Warrenton Training Center in October, November and December, 1953.

60. Selling milk at price of $4.00 per cwt. to Chestnut Farms Dairy for resale to or at Chief Petty Officers' Mess, U. S. Naval Air Station, Patuxent River, Maryland, in October, November and December, 1953, although defendant had not established said price for milk supplied dealer-customers for resale to or at U. S. Naval Air Station, Patuxent River, Maryland, in October, November and December, 1953.

61. Selling milk at price of $4.00 per cwt. to Chestnut Farms Dairy for resale to or at Officers' Club Mess, U. S.

Naval Air Station, Patuxent River, Maryland, in October, November and December, 1953, although defendant had not established said price for milk supplied to dealer-customers [fol. 1961] for resale to or at U. S. Naval Air Station, Patuxent River, Maryland, in October, November and December, 1953.

62. Selling milk at price of $4.00 per cwt. to Chestnut Farms Dairy for resale to or at Naval Powder Factory, Indian Head, Maryland, in October, November and December, 1953, although defendant had not established said price for milk supplied dealer-customers for resale to or at Naval Powder Factory in October, November and December, 1953.

63. Selling milk at price of $4.00 per cwt. to Chestnut Farms Dairy for resale to or at Camp Detrick, Maryland, in October, November and December, 1953, although defendant had not established said price for milk supplied dealer-customers for resale to Camp Detrick in October, November and December, 1953.

64. Selling milk at price of $2.60 per cwt. to Chestnut Farms Dairy for resale to or at Camp Detrick, Maryland, in April, May and June 1954, although defendant had not established so low a price for milk supplied dealer-customers for such resale.

65. Selling milk at price of $2.60 per cwt. to Chestnut Farms Dairy for resale to or at Naval Powder Factory, Indian Head, Maryland, in April, May and June 1954, although defendant had not established so low a price for milk supplied dealer-customers for such resale.

66. Selling milk at price of $2.60 per cwt. to Chestnut Farms Dairy for resale to or at Warrenton Training Center, Warrenton, Virginia, in April, May and June 1954, although defendant had not established so low a price for milk supplied dealer-customers for such resale.

67. Selling milk at former Class I price to Chestnut Farms Dairy for resale on government contracts (D. C. institutions, National Institutes of Health, Naval Powder Factory) in July and August, 1956, following an increase

in Class I price, while other dealer-customers were charged and paid the higher Class I price for milk resold by them on Government contracts in the same months.

[fol. 1962] Include under Subparagraph 1 the following (these particulars correspond to matters set forth in plaintiff's answer to defendant's interrogatory VIII, served February 28, 1958):

5. Secretly employing or subsidizing persons to present as their own the views of defendant, or to publicize views consonant with those of defendant, relative to legislation and regulation affecting defendant and/or to arouse public opinion favorable to the point of view of defendant, including Mrs. Harvey W. Wiley, Mrs. Horace J. Phelps, Mrs. Ernest William Howard, Coleman C. Gore, P. C. Turner, C. F. Bletch, and others unknown to plaintiff, in or about the period 1939 to date.

6. Acting to exclude Rainier's Dairies, Bridgeton, New Jersey, from competing with dealer-customers of defendant in the distribution and sale of fluid milk to government installations and institutions in the Washington metropolitan area, and offering to sell milk to Rainier's, in or about 1957, only at prices which would make it virtually impossible to Rainier's to compete with other dealer-customers of defendant in the sale of fluid milk to such installations and institutions.

Other particulars as to the matters alleged in Paragraph 22 of the amended complaint are unknown at this time to plaintiff.

Joseph J. Saunders, Attorney, Department of Justice.

[fol. 1963] Certificate of Service (omitted in printing).

[fol. 2290] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

SUPPLEMENT NO. 2 TO STATEMENT OF PARTICULARS—
Filed August 29, 1958

Plaintiff United States of America furnishes herein particulars as to acts, practices and courses of conduct of defendant supplementary to those particulars previously furnished.

Include under Subparagraph a the following:

15. Requiring dealers, including Richfield Dairy Corporation, Wakefield Dairy, Lucerne Milk Company, Thompson's Dairy and others unknown to plaintiff to accept delivery of "quotas" of milk or to accept delivery of milk in excess of their requirements in or about the period 1946 to 1951.

Include under Subparagraph b the following:

14. Preventing or attempting to prevent milk of non-member farmers from being transported to the Washington area market by prohibiting members' milk from being shipped in trucks of independent contract haulers which transported milk of non-members, in or about the period 1953 to 1957.

15. Attempting to induce or cause Coleman C. Gore to cease the business of supplying milk of independent producers to Washington metropolitan area dealers in or about the period 1940 to 1943.

16. Using extensive advertising against existing and new competition in or about the period 1954 to 1958.

17. Attempting to induce Mahlon Kirk IV, a field representative of Green Spring Dairy, Baltimore, Maryland, to [fol. 2291] cause former suppliers of Embassy Dairy, Inc.,

who were diverted from the Washington area market by defendant's acquisition of Embassy's assets and who might be considering resumption of shipments of milk to the Washington market, to do so through defendant, by offering in or about 1955 to pay said Mahlon Kirk IV a sum of money for each such fornier supplier induced by him to become a member of defendant.

18. Discouraging shipment of milk to the Washington metropolitan area by persons seeking to market their milk in said area while using all efforts to secure as members persons who nevertheless undertook to market their milk in said area, in or about the period 1953 to 1957.

19. Initiating action in or about 1954 to purchase Richfield Dairy in order to preclude Richfield from being an outlet for milk supplied by others.

Include under Subparagraph h the following:

68. Selling milk at price of $4.30 per cwt. to Chestnut Farms Dairy for resale to or at Naval Radio Station, Cheltenham, Maryland, in January, February and March 1954, although defendant had not established said price for milk supplied dealer-customers for resale to or at said Naval Radio Station in January, February or March, 1954.

69. Selling milk at price of $4.10 per cwt. to Chestnut Farms Dairy for resale to commissary store located at U. S. Naval Air Station, Patuxent River, Maryland, in the period January to June 1954, although defendant purported not to sell milk at reduced prices for resale by dealers for consumption off premises of government installations.

70. Selling milk at price of $4.10 per cwt. (contract price) to Chestnut Farms Dairy for resale to Officers' Club, U.S. Naval Air Station, Patuxent River, Maryland, in the period January to June 1954, while selling milk to Richfield Dairy Corporation for resale to Chief Petty Officers' Mess, U.S. Naval Air Station, Patuxent River, Maryland, in the same period at prices of $5.40 and $4.94 per cwt. (fringe prices).

71. Requiring or attempting to require as a condition to the sale of milk to Embassy Dairy, Inc., in or about 1951 [fol. 2292] that all milk received by Embassy from other than D. C.-inspected sources be classified first in Class III while not requiring the same condition in the sale of milk to Chestnut Farms Dairy in or about the same period.

72. Selling milk to Embassy Dairy, Inc., in or about 1952 on the basis of an arbitrary classification ratio of 85 percent Class I—15 percent Class II although defendant believed and/or had knowledge that Embassy had a higher percentage of Class I utilization.

Please take notice that the classification policy of defendant referred to in Particular No. 6 of Subparagraph a was also applied or attempted to be applied by defendant to Lucerne Milk Company and to others unknown to plaintiff.

Joseph J. Saunders, Attorney, Department of Justice.

Certificate of Service (omitted in printing).

[fol. 2376] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

SUPPLEMENT NO. 3 TO STATEMENT OF PARTICULARS—
Filed September 8, 1958

Plaintiff United States of America furnishes herein particulars as to acts, practices, and courses of conduct of defendant supplementary to those particulars previously furnished:

Include under Subparagraph a the following:

16. Requiring Golden Rule Dairy, Silver Spring, Maryland, to pay at the Class I rate for all milk supplied by defendant to said Golden Rule Dairy in July 1950 although defendant had knowledge that the said Golden Rule Dairy

had not utilized all of said milk in Class I and that said Golden Rule Dairy had in fact utilized quantities of milk supplied by defendant in Class II for which a lower rate was in effect.

Include under Subparagraph b the following:

21. Making a loan of $250,000 to the newly incorporated Birmingham Dairy Products Company, Inc., in or about 1957 with the knowledge that the said Birmingham Dairy Products Company, Inc., intended to use said $250,000 to buy all of the assets of Birmingham Dairy Company, Inc., Manassas, Virginia, through arrangements involving Alexandria Dairy Products Company, Alexandria, Virginia, which had common shareholders and officers with Birmingham Dairy Products Company, Inc., and whose endorsement and the endorsement of whose president were conditions of the said loan.

Joseph J. Saunders, Attorney, Department of Justice.

[fol. 2377] Certificate of Service (omitted in printing).

[fol. 2545]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4482-56

UNITED STATES OF AMERICA, Plaintiff,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, Defendant.

JUDGMENT—November 10, 1958

This cause coming on to be heard upon defendant's third, fourth, fifth and sixth affirmative defenses a. to which the Court ordered a separate trial under the provisions of Rule 42(b) FRCP, and defendant having withdrawn its sixth affirmative defense, it is this 10 day of November, 1958

AH

Adjudged, Ordered and Decreed, That the third (*Capper-Volstead Act* §§1 & 2) and fifth (*Clayton Act* §6) affirmative defenses be and they are hereby severally sustained as to the cause of action pleaded in Paragraphs 21, 22 and 23 of the last amended complaint, and the said cause of action is hereby dismissed, with prejudice.

The Court adopts as its findings of fact and conclusions of law its Opinion filed herein October 16, 1958.

By the Court

Alexander Holtzoff, Judge.

[fol. 2550]
Files
Mrs. Cooper
Mr. Whittinghill
Mr. Saunders

LETTER TRANSMITTING PLAINTIFF'S PROPOSED JUDGMENT—
Filed January 22, 1959

VEH:CLW
60-0-37-31

January 21, 1959

Honorable Alexander Holtzoff
United States District Judge
United States Courthouse
Washington, D. C.

Re: United States v. Maryland and Virginia
Milk Producers Assn., Civil No. 4482-56

Dear Judge Holtzoff:

In accordance with the Court's instructions, a copy of a draft of Judgment prepared by the Government was served upon defendant on January 19, 1959.

Since defendant has furnished you with a copy of its draft of Judgment, we believe it appropriate that you also have a copy of the Government's proposed Judgment in ad-

vance of Thursday's hearing. A copy of such draft is enclosed.

Sincerely yours,

JOSEPH J. SAUNDERS
Attorney

Enclosure

cc: Bergson & Borkland, Esquires
918—16th Street, N.W.
Washington, D. C.

[fol. 2551] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action 4482-56

UNITED STATES OF AMERICA, Plaintiff,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, Defendant.

PROPOSED JUDGMENT—Filed January 22, 1959

A separate trial having been conducted herein by the Court as to plaintiff's causes of action predicated upon Section 7 of the Act of Congress of October 15, 1914, as amended, commonly known as the Clayton Act, 15 U.S.C. §18; and

Argument having been heard by the Court as to plaintiff's causes of action predicated upon Sections 1 and 3 of the Act of Congress of July 2, 1890, as amended, commonly known as the Sherman Act, 15 U.S.C. §§1 and 3, which were submitted by the parties for adjudication on the basis of the record of the aforesaid trial; and

Findings of Fact and Conclusions of Law having been made in Opinions of the Court filed herein on November 21, 1958 and January 14, 1959; and

The Court having heard argument on the relief appropriate in the premises and being fully advised;

It Is Hereby Ordered, Adjudged and Decreed, as follows:

I

(A) This Court has jurisdiction of the subject matter herein pursuant to Section 15 of the Act of Congress of October 15, 1914, as amended, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes," commonly known as the Clayton Act, 15 U.S.C. §25, and Section 4 of the Act of Congress of July 2, 1890, as amended, entitled, "An Act to [fol. 2252] Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, 15 U.S.C. §4, and has jurisdiction of the parties hereto.

(B) The acquisition by defendant of the assets of Embassy Dairy, Inc., on or about July 26, 1954, and the contracts ancillary thereto, were and are in violation of Section 7 of the Clayton Act, 15 U.S.C. §18.

(C) The defendant has been and is a party to certain contracts and agreements with Embassy Dairy, Inc., and other persons, the purpose and effect of which are and have been to restrain trade and commerce in milk and fluid milk within the Washington metropolitan area, in violation of Section 3 of the Sherman Act, 15 U.S.C. §3.

II

The provisions of this Judgment shall be binding upon the defendant, its officers, agents, servants, employees, attorneys, subsidiaries, successors and assigns, and upon those persons in active concert or participation with the defendant who receive actual notice of this Judgment by personal service or otherwise. Defendant is ordered and directed to take such steps as are necessary to secure compliance herewith by its officers and such other persons as are described above.

III

(A) Within one (1) year after the entry of this Judgment, defendant shall, pursuant to the terms and conditions of this Section III, dispose of as a unit and as a going dairy business all assets acquired on or about July 26, 1954 from Embassy Dairy, Inc., which are in the possession of defendant at the date of the disposal required by this subsection (A), together with all other assets used as of such date in the dairy business conducted by defendant under the trade name "Embassy Dairy." The divestiture required by this subsection (A) shall be made upon such terms and to such purchaser as the Court may approve.

[fol. 2553] (B) The divestiture ordered and directed by subsection (A) of this Section III shall be made in good faith and shall be absolute, unqualified and unconditional. None of the assets ordered to be divested shall be sold or disposed of directly or indirectly to any person or corporation in which defendant owns any stock or financial interest, to any one or more officers, directors, agents, employees or members of defendant or to any other person or persons acting for or under the control of defendant; provided, however, that if such assets are not sold or disposed of entirely for cash, nothing herein contained shall be deemed to prohibit defendant from accepting and enforcing a bona fide lien, mortgage, deed of trust or other form of security for the purpose of securing to defendant full payment of the price at which such assets are disposed of or sold.

(C) If after bona fide disposal of the assets referred to in subsection (A) of this Section III, defendant by enforcement or settlement of a bona fide lien, mortgage, deed of trust, or other form of security regains ownership or control of any of such assets, it shall again divest itself of such assets thus regained. Such subsequent divestiture shall be made subject to all provisions of this Judgment, and shall be completed within one (1) year from the date that such assets are thus regained.

(D) Within sixty (60) days after entry of this Judgment, defendant shall render to the Court, and serve upon the plaintiff, a report stating the efforts made by defendant to

dispose of the assets referred to in subsection (A) of this Section III. Each ninety (90) days thereafter, continuing until consummation of the disposal required by subsection (A) of this Section III, and each ninety (90) days after reacquisition of such assets and continuing until consummation of any disposal required by subsection (C) of this Section III, defendant shall render to the Court, and serve upon the plaintiff, a report stating the efforts made by defendant to dispose of said assets. Forty-five (45) days prior to [fol. 2554] effectuation of any divestiture ordered and directed by this Section III, defendant shall render to the Court, and serve upon the plaintiff, a report stating the name and address of the person to whom the assets are to be transferred and the terms and conditions of the proposed transfer. All reports required by this subsection (D) to be submitted by defendant shall be in writing and under oath.

(E) Pending disposition of the assets referred to in subsection (A) of this Section III, defendant shall take such steps as are necessary to maintain the plant, equipment and business of Embassy Dairy at the standard of operational performance as a going dairy business in effect at the time of entry of this Judgment and shall not diminish said assets or turn them to uses other than those of a going dairy business, subject, however, to ordinary wear and tear and except in the ordinary course of business. To preclude any diminution, diversion or impairment of the business conducted under the trade name "Embassy Dairy," defendant shall not, prior to consummation of the disposal required by subsection (A) of this Section III, otherwise engage in the wholesale or retail distribution of fluid milk within the Washington metropolitan area.

(F) In order to ensure reasonable protection of the purchaser in the enjoyment of the assets required by subsection (A) of this Section III to be disposed of by defendant, defendant is enjoined and restrained for a period of ten (10) years from consummation of the disposal required by said subsection from engaging in the wholesale or retail distribution of fluid milk within the Washington metropolitan area.

(G) In the event that, within the time prescribed by subsection (A) of this Section III, defendant has not effectuated the divestiture required by said subsection, the provisions of subsection (B) of Section VI of this Judgment shall become operative; provided, however, that nothing in this subsection (G) shall be deemed to preclude modification of this Judgment so as to require defendant to effectuate di- [fol. 2555] vestiture of the assets referred to in subsection (A) of this Section III within such further time as the Court may direct.

IV

(A) So much of the contracts and agreements by and between defendant and Embassy Dairy, Inc., Green Spring Dairy, Inc., Green Spring Milk Company, Homestead Dairy Products Company, James J. Ward, James J. Ward, Jr., John Ward and R. Jeanne Ward, made on or about May 26, 1954, as provide that for a period of ten years the aforementioned persons will not engage in the sale or distribution of milk, cream or other dairy products in an area consisting of the District of Columbia and adjacent parts of the States of Maryland and Virginia, are hereby declared invalid and defendant is enjoined and restrained from enforcing or claiming any rights under any such contractual provisions.

(B) Within fifteen (15) days after entry of this Judgment defendant shall give written notice of the provisions of this Judgment to each of the persons referred to in subsection (A) of this Section IV and give to each of such persons written notice of cancellation of the contractual provisions referred to in subsection (A) of this Section IV.

V

(A) Defendant is ordered and directed, subject to the provisions of subsection (B) of this Section V, to terminate without penalty, upon written demand by the producer, the membership contract of any producer of milk who is a member of defendant at the time of entry of the Judgment and who was supplying milk to Embassy Dairy, Inc., in or about May 1954.

(B) Within fifteen (15) days after entry of this Judgment, defendant shall give to each producer of milk referred to in subsection (A) of this Section V written notice of the provisions of this Judgment and, in addition, shall specifically inform each such producer in writing of his right to terminate his membership contract, if any, with defendant upon ten (10) days written notice at any time be- [fol. 2556] tween the date of entry of this Judgment and three (3) years after the date of defendant's disposal of assets required by Section III of this Judgment. Each such producer, while a member of defendant, shall have the right, without notifying defendant, to enter into negotiations for supplying his milk to others than defendant, provisions of his membership contract with defendant to the contrary notwithstanding.

VI

(A) In each calendar quarter, i.e., January to March, April to June, July to September, October to December, all inclusive, commencing with the first full calendar quarter after entry of this Judgment and continuing until consummation of the disposal required by subsection (A) of Section III of this Judgment, defendant shall purchase on reasonable terms and conditions, in approximately equal quantities, from a minimum of three (3) suppliers or producers not affiliated directly or indirectly with defendant at least seventy-five (75) percent of Embassy Dairy's requirements of milk for resale as fluid milk to federal installations and institutions; provided, however, that this subsection (A) shall not be deemed to require such purchase in any quarter in which Embassy Dairy's requirements of milk for resale as fluid milk to federal installations and institutions average less than one thousand (1000) gallons per day. In complying with the provisions of this subsection (A), defendant shall not require, as a condition of purchase, that milk meet any standard or quality requirement other than applicable federal specifications for milk for resale as fluid milk to the federal government.

(B) Subject to the provisions of subsection (G) of Section III of this Judgment, defendant shall purchase all milk which is offered for sale by suppliers or producers

not affiliated directly or indirectly with defendant for utilization as fluid milk in the plant of defendant's Embassy Dairy division, up to and including the entire requirements thereof, exclusive of milk for resale to federal installations and institutions; provided, however, that all such milk shall [fol. 2557] be approved by the appropriate health authority and that defendant shall not be required to purchase any of such milk at prices in excess of prices it charges competing dealers for milk for resale as fluid milk.

VII

Defendant is enjoined and restrained for a period of twenty (20) years from the date of entry of this Judgment from acquiring, directly or indirectly, through subsidiaries or otherwise, either by acquisition of stock or other share capital, or by the acquisition of assets, the business of any person, partnership, corporation or other legal entity engaged in the sale or distribution of milk for resale as fluid milk or of fluid milk within the Washington metropolitan area; provided, however, that if at any time during said period defendant desires to make any acquisition which otherwise would be prohibited by the foregoing, it shall notify plaintiff in writing and disclose the facts with respect to such proposed acquisition, and the reasons therefor. If the plaintiff shall not, in writing, object to the proposed acquisition within sixty (60) days after receipt of such notice and disclosure of facts, such acquisition shall be deemed not to be in violation of this Judgment. In the event the plaintiff shall object, defendant may apply to the Court for permission to make such acquisition, which may be granted upon a showing by the defendant to the satisfaction of the Court that the acquisition will not substantially lessen competition or tend to create a monopoly in the sale or distribution of milk for resale as fluid milk in the Washington metropolitan area, or in the sale and distribution of fluid milk within the Washington metropolitan area.

VIII

(A) The causes of action alleging violations of Section 1 of the Sherman Act, 15 U.S.C. §1, pleaded in Paragraphs

24, 25, 26, 27, and 28 of the amended complaint are hereby dismissed, without prejudice.

(B) Judgment is ordered for defendant as to Paragraph 29A of the amended complaint. The causes of action pleaded in said paragraph are hereby dismissed on the merits, with prejudice.

[fol. 2558]

IX

For the purpose of securing compliance with this Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant at its principal office, be permitted (1) access, during defendant's office hours, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of defendant relating to any of the subject matters contained in this Judgment; and (2) subject to the reasonable convenience of defendant and without restraint or interference from it, to interview officers or employees of defendant, who may have counsel present, regarding any such matters; and (3) to require defendant to submit such reports in writing under oath to the Department of Justice with respect to matters contained in this Judgment as may from time to time be necessary to the enforcement of this Judgment. No information obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of plaintiff, except in the course of court proceedings to which the United States of America is a party, for the purpose of securing compliance with this Judgment or as otherwise required by law.

X

Jurisdiction is retained for the purpose of enabling either of the parties to this Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out

of this Judgment or for the modification of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

[fol. 2559]

XI

The provisions of this Judgment may be stayed pending a final determination of any appeal taken therefrom. Such stay shall be conditioned upon the diligent prosecution by defendant of such appeal as may be allowed it and the maintenance and operation by it of the dairy business here involved, pending such appeal, in a manner which will not prejudice the ultimate enforcement of this Judgment.

XII

Defendant shall pay all taxable costs incurred by plaintiff in prosecuting the violations of the antitrust laws referred to in subsections (B) and (C) of Section I of this Judgment.

Entered this day of January 1959.

.....

United States District Judge

[fol. 2560]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4482-56

UNITED STATES OF AMERICA, Plaintiff,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, Defendant.

FINAL JUDGMENT—January 22, 1959

This Court having conducted a separate trial as to plaintiff's causes of action stated in Paragraphs 29 and 29A of the Complaint as amended and having rendered its opinion thereon dated November 21, 1958; and having conducted a further separate trial as to plaintiff's causes of action stated in Paragraphs 24 to 28, inclusive, of the Complaint as amended and having rendered its opinion thereon dated January 14, 1959; and each of said opinions containing the Court's Findings of Fact and Conclusions of Law, it is this *22d* day of January 1959, hereby

Adjudged, Ordered and Decreed That:

1. The acquisition by defendant of certain assets of Embassy Dairy, Inc. on or about July 26, 1954, and the contracts ancillary thereto, were and are in violation of Section 7 of the Clayton Act (15 U.S.C. §18).

2. The acquisition by defendant of the capital stock of Richfield Dairy Corporation, and Simpson Bros., Inc., trading as Wakefield-Model Farms Dairy, was not and is not in violation of Section 7 of the Clayton Act and the cause of action relating thereto is dismissed with prejudice.

[fol. 2561] 3. The contract of May 26, 1954 ~~by~~ *pursuant to* which defendant acquired certain assets of Embassy Dairy, Inc., and the ancillary contracts ~~of the same date~~ were and are in violation of Section 3 of the Sherman Act (15 U.S.C. §3).

4. Within one (1) year from the date ~~of the~~ *hereof* ~~expiration of the stay granted herein~~ the defendant shall dispose of as a unit and as a going dairy business all assets of Embassy Dairy, Inc., *tangible or intangible, and* which it acquired on July 26, 1954, ~~or~~ replacements therefor, ~~and now in its possession. Such assets shall not include assets of Richfield Dairy Corporation and Simpson Bros., Inc., trading as Wakefield-Model Farms Dairy, acquired by defendant pursuant to its contract of December 6, 1957 by which defendant purchased the capital stock of the said corporations.~~

Italicized material handwritten.

5. The divestiture herein ordered shall be in good faith *on notice to counsel for the plaintiff*
AH and shall require the prior approval of this Court ^. Within *date hereof*
sixty (60) days from the ~~expiration of the~~ ^ ~~stay granted herein~~, the defendant shall report to the Court its efforts to carry into effect the divestiture herein ordered. Further *every ninety (~~do~~ 90) days thereafter and*
reports shall be made to this Court ^ on such *other* dates
AH as this Court may order. ~~All such reports shall be held confidential~~.

6. Pending divestiture, defendant shall administer the *and replacements therefor*
AH assets acquired from Embassy Dairy, Inc., ^ in good faith as a going dairy business with a view to preserving the said assets in as good condition as possible, ordinary wear and tear excepted. For legitimate business purposes, present assets may be replaced by other assets of substantially equal value. If deemed advisable in the operation in good faith of the said dairy business, capital improvements may [fol. 2562] be made. ~~and the value of any capital improvement made after July 26, 1954 shall be taken into consideration in determining the reasonableness of any offer of purchase of the said dairy business.~~ The sale of any *$10,000*
Capital asset of a value in excess of ^ ~~$25,000~~ shall require the prior approval of the Court.

7. So much of the contracts by and between defendant and Embassy Dairy, Inc., Green Spring Dairy, Inc., Green Spring Milk Company, Homestead Dairy Products Company, James J. Ward, James J. Ward, Jr., John Ward and R. Jeanne Ward, respectively, made on or about May 26, 1954, as provide that for a period of ten years the aforementioned persons will not engage in the sale or distribution of milk, cream or other dairy products in an area consisting of the District of Columbia, and adjacent parts of the States of Maryland and Virginia, are hereby declared invalid and defendant is enjoined and restrained from enforcing or claiming any rights under such pro-

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Italicized material handwritten.

visions. ~~Within fifteen (15) days after the expiration of the stay granted herein, defendant shall give to each said person written notice of cancellation of the aforesaid provisions of such contracts.~~

8. Jurisdiction of the causes of action stated in Paragraph 29 and Paragraphs 24 to 28, inclusive, of the Complaint as amended is retained for the purpose of enabling either of the parties to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, ~~for the modification of any of the provisions thereof~~, and for the enforcement of compliance therewith and punishment of violations thereof.

~~9. The provisions of this Final Judgment are hereby stayed pending a final determination of any appeal taken~~ [fol. 2563] ~~therefrom. Such stay is conditioned upon the diligent prosecution by defendant of such appeal as may be allowed it and the maintenance and operation by it of the dairy business herein involved pending such appeal in a manner which will not prejudice the ultimate enforcement of this Final Judgment.~~

9 ~~10~~. Neither party shall be allowed costs.

Alexander Holtzoff, United States District Judge.

[fol. 2564] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4482-56

UNITED STATES OF AMERICA, Plaintiff,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, Defendant.

ORDER DISMISSING CERTAIN CLAIMS—January 30, 1959

Upon motion of the plaintiff, the Court being fully advised in the premises, it is this 30th day of January, 1959, hereby

Ordered that the claims for relief under Section 1 of the Sherman Act, 15 U.S.C. §1, pleaded in Paragraphs 24, 25, 26, 27, and 28 of the complaint herein, as amended, be and they hereby are dismissed.

Alexander Holtzoff, United States District Judge.

[fol. 2565] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER GRANTING STAY OF FINAL JUDGMENT PENDING APPEAL—Filed January 30, 1959

Upon consideration of defendant's motion for a stay *from*
AH pending appeal ~~of~~ the Final Judgment entered herein on January 22, 1959, and it appearing to the Court that defendant is entitled to such a stay, it is hereby

Ordered that the said Final Judgment of January 22, 1959 be and the same is hereby stayed in all respects until the disposition of defendant's appeal to the Supreme Court of the United States, provided that defendant prosecute its appeal with due diligence.

Alexander Holtzoff, United States District Judge.

[fol. 2567] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF APPEAL OF MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., TO THE SUPREME COURT OF THE UNITED STATES—Filed March 11, 1959

I. *Notice of Appeal*

Notice is hereby given that the Maryland and Virginia Milk Producers Association, Inc., the defendant above named, hereby appeals to the Supreme Court of the United States from so much of the Final Judgment entered in this action on January 22, 1959, as is embodied in paragraphs 1, 3, 4, 5, 6, 7 and 8 thereof.

This appeal is taken pursuant to Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. §29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989, 28 U.S.C. §2101.

II. *Designation of Record*

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint, filed November 21, 1956.
2. Amended Complaint, filed February 7, 1957.
3. Answer, filed February 18, 1957.
4. Transcripts of Proceedings, October 13, 14 and 15, 1958.

[fol. 2568] 5. Transcript of October 16, 1958, including the Opinion of the United States District Court For The District of Columbia.

6. Transcripts of Proceedings, November 10, 12, 13, 14, 18, 19 and 20, 1958.

7. Transcript of November 21, 1958, including the Opinion of the United States District Court For The District of Columbia.

8. Transcript of Proceedings, January 12, 1959.

9. Transcript of January 14, 1959, including the Opinion of the United States District Court For The District of Columbia.

10. Defendant's Exhibits Nos. 1 through 67, inclusive.

11. Plaintiff's Exhibits Nos. 29, 32, 35, 36, 110, 113, 114, 115, 120.

12. Final Judgment, entered January 22, 1959.

13. Order, entered January 30, 1959.

14. Order Granting Stay Pending Appeal, entered January 30, 1959.

III. *Questions Presented*

1. The Capper-Volstead Act, elaborating the antitrust exemption contained in Section 6 of the Clayton Act, specifically authorizes farmers to combine in agricultural cooperatives, to engage in the collective "processing, preparing for market, handling, and marketing" of members' products and "to make the necessary contracts and agreements to effect such purposes." Defendant, a cooperative association of farmers engaged in the production of milk, acquired the assets of a dairy corporation engaged in the processing and distribution of milk and milk products. The District Court held that the association qualified under the provisions of the Capper-Volstead Act and Section 6 [fol. 2569] of the Clayton Act, and that it was therefore entitled to antitrust exemption when acting independently. The acquisition, however, was held to violate Section 7 of the Clayton Act and Section 3 of the Sherman Act. On these facts, the questions presented are:

A. Is a cooperative association of milk producers deprived of its antitrust exemption and subject to prosecution under Section 7 of the Clayton Act where,

in expanding its operations to the authorized functions of processing and distributing milk, it acquires the assets of a non-exempt dairy corporation, absent proof that the transaction was made for the purpose or with the effect of conferring an anticompetitive benefit on the non-exempt vendor?

B. Is a cooperative association of milk producers deprived of its antitrust exemption and subject to prosecution under Section 3 of the Sherman Act where it acquires the above assets from a non-exempt corporation pursuant to a purchase contract and normal ancillary covenants not to compete, absent proof that the transaction was made for the purpose or with the effect of conferring an anticompetitive benefit on the non-exempt vendor?

2. Section 7 of the Clayton Act is inapplicable by its terms

> "to transactions duly consummated pursuant to authority given by . . . the Secretary of Agriculture under any statutory provision vesting such power in such . . . Secretary."

While no statutory provision expressly authorizes the Secretary of Agriculture to approve or ratify any merger or acquisition, Section 2 of the Capper-Volstead Act directs the Secretary of Agriculture to institute proceedings [fol. 2570] against any agricultural cooperative association which he "shall have reason to believe . . . monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced thereby." The Secretary is further directed to refer cases of violation to the Attorney General for enforcement.

In a situation where the Secretary of Agriculture examines the acquisition of assets of a dairy corporation by a cooperative association of milk producers and advises the Attorney General that he finds no evidence of violation of the Capper-Volstead Act, the question presented is whether the cooperative is subject to prosecution under

Section 7 of the Clayton Act notwithstanding the exemption contained therein.

William J. Hughes, Jr., 821—15th Street, N.W., Washington, D. C.; Herbert A. Bergson, 918 16th Street, N.W., Washington 6, D. C., Attorneys for Defendant.

Of Counsel: Bergson & Borkland, World Center Building, Washington 6, D. C.

Certificate of Service (omitted in printing).

[fol. 2571] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF APPEAL OF UNITED STATES OF AMERICA, TO THE SUPREME COURT OF THE UNITED STATES—Filed March 23, 1959

I.

Notice is hereby given that the United States of America, plaintiff in the above entitled action, hereby appeals to the Supreme Court of the United States from the following final orders of the district court entered in this action:

1) Judgment of November 10, 1958, dismissing the causes of action pleaded in paragraphs 21, 22 and 23 of the amended complaint.

2) Decree of January 22, 1959, insofar as it fails to provide relief adequate to insure effectuation of the basic divestment order.

This appeal is taken pursuant to Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29.

II.

The Clerk will please prepare a transcript of the record in the above entitled action for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Amended Complaint, filed February 7, 1957
2. Answer, filed February 18, 1957
3. Statement of Particulars, served October 31, 1957
4. Supplement to Statement of Particulars, served March 21, 1958

[fol. 2572] 5. Supplement No. 2 to Statement of Particulars, served August 28, 1958

6. Supplement No. 3 to Statement of Particulars, served September 5, 1958
7. Stipulation No. 1, filed March 20, 1958
8. Stipulation No. 2, filed March 20, 1958
9. Stipulation No. 3, filed May 8, 1958
10. Stipulation No. 4, filed March 20, 1958
11. Stipulation No. 6, filed July 29, 1958
12. Plaintiff's Memorandum in Reply to Defendant's Motion under Rule 30(b) to Terminate Plaintiff's Discovery as of May 1, 1958, served June 6, 1958—with attached Exhibit A and Affidavit of Joseph J. Saunders
13. Transcript of Proceedings, October 1, 1957
14. Transcript of Proceedings, February 10, 1958
15. Transcript of Proceedings, June 10, 1958
16. Transcript of Proceedings, July 31, 1958
17. Transcript of Proceedings, October 7, 1958
18. Transcript of Proceedings, October 13 through 16, 1958

19. Judgment, entered November 10, 1958

20. Plaintiff's Interrogatories, served February 21, 1958

21. Plaintiff's Interrogatories, served May 19, 1958

22. Plaintiff's Interrogatories, served September 8, 1958

23. Plaintiff's Interrogatories, served September 26, 1958

24. Defendant's Answers to Plaintiff's Interrogatories of February 21, 1958, served June 24, 1958

25. Defendant's Answers to Plaintiff's Interrogatories of February 21, 1958, served July 16, 1958

26. Defendant's Answers to Plaintiff's Interrogatories of May 19, 1958, served August 18, 1958

27. Defendant's Answers to Plaintiff's Interrogatories of September 8, 1958, served September 23, 1958

28. Defendant's Interrogatories, served January 7, 1958

29. Defendant's Interrogatories, served May 5, 1958

30. Plaintiff's Answers to Defendant's Questions (informal interrogatories) of December 11, 1957, served January 31, 1958, and accompanying letter of transmittal (Joseph J. Saunders to Bergson & Borkland)

[fol. 2573] 31. Plaintiff's Answers to Defendant's Interrogatories of January 7, 1958, served February 28, 1958

32. Plaintiff's Requests for Admission—
Part One, served December 31, 1957
Part Two, served January 15, 1958
Part Three, served April 15, 1958
Part Four, served July 31, 1958
Part Five, served August 14, 1958
Part Six, served August 26, 1958
Part Seven, served August 29, 1958
Part Eight, served September 5, 1958
Part Nine, served September 12, 1958
Part Ten, served September 19, 1958
Part Eleven, served September 26, 1958

33. Response to Plaintiff's Requests for Admission, served February 19, 1958

34. Response to Plaintiff's Requests for Admissions 416-815, served May 26, 1958

35. Response to Plaintiff's Requests for Admissions, Part Four, served September 3, 1958

36. Supplemental Responses to Plaintiff's Requests for Admissions, Part Four, served September 3, 1958

37. Supplement to Defendant's Responses to Plaintiff's Requests for Admissions, served September 3, 1958

38. Amendment to Defendant's Response to Plaintiff's Requests for Admissions, Part One, served September 17, 1958

39. Response to Plaintiff's Requests for Admission, Part Five, served September 17, 1958

40. Response to Plaintiff's Requests for Admission, Part Six, served September 25, 1958

41. Response to Plaintiff's Requests for Admission, Parts Seven and Eight, served September 29, 1958

42. Amendment to Defendant's Responses to Plaintiff's Requests for Admissions, served September 29, 1958

43. Response to Plaintiff's Requests for Admissions, Part Nine, served October 6, 1958

44. Response to Plaintiff's Requests for Admissions, Part Ten, served October 6, 1958

45. Response to Plaintiff's Requests for Admissions, Part Eleven, served October 6, 1958

46. Record of Trial of Section 7 Clayton Act Causes of Action—Transcript of Proceedings, November 10, 12, 13, 14, 18, 19, 20, and 21, 1958, and all exhibits introduced by the Government

[fol. 2574] 47. Transcript of Proceedings, December 15, 1958

48. Transcript of Proceedings, January 12 and 14, 1959

49. Transcript of Proceedings, January 22, 1959

50. Plaintiff's Proposed Judgment and accompanying letter of transmittal (Joseph J. Saunders to Alexander Holtzoff, United States District Judge, dated January 21, 1959), filed January 22, 1959

51. Final Judgment, entered January 22, 1959

52. Transcript of Proceedings, January 30, 1959

53. Order, entered January 30, 1959

54. Order Granting Stay Pending Appeal, entered January 30, 1959

55. This notice of appeal

III.

The following questions are presented by this appeal:

1) Whether the Capper-Volstead Act and Section 6 of the Clayton Act confer upon an agricultural cooperative absolute immunity from the prohibitions in Section 2 of the Sherman Act against monopolizing and attempting to monopolize.

2) Whether the district court erred and failed to provide adequate relief in—

(a) refusing to order defendant to divest all assets used in operating Embassy Dairy as a going concern as of the date of divestment;

(b) refusing to prohibit defendant from operating a dairy other than Embassy pending divestiture and for a reasonable period thereafter;

(c) refusing to forbid for a reasonable period the acquisition by defendant of any new dairy unless defendant shows that such an acquisition would not substantially lessen competition or tend toward monopoly;

[fol. 2575] (d) denying the Government visitation rights to enforce the decree.

Joseph J. Saunders, Edna Lingreen, J. E. Waters, Attorneys, Department of Justice.

[fol. 2576] Proof of Service (omitted in printing).

[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4482-56

UNITED STATES OF AMERICA, Plaintiff,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, Defendant.

Transcript of Pretrial Proceedings of October 1, 1957

Washington, D. C.

The above-entitled action came on for hearing of pretrial proceedings before The Honorable ALEXANDER HOLTZOFF, United States District Judge, at 1:45 o'clock p.m.

APPEARANCES:

On behalf of the Plaintiff:

JOSEPH J. SAUNDERS, and
J. E. WATERS,
Attorneys, Department of Justice.

On behalf of the Defendant:

WILLIAM J. HUGHES, JR.
HERBERT A. BERGSON, and
DANIEL H. MARGOLIS.

[fol. 2] PROCEEDINGS

STATEMENT BY THE COURT

The Court: Gentlemen, in this case it is my thought not to follow the usual customary procedure that we do in connection with pretrials, namely, to have a pretrial order dictated by the Judge to a typist as we go along. In view of the fact that this is a complicated antitrust case I think that usual mode of procedure would not be feasible, and I am directing, unlike other pretrial proceedings in this court, that this pretrial should be reported and a transcript of the pretrial proceedings and the directions contained therein will stand as a pretrial order. If any counsel wishes to have a formal order entered in addition to the statements contained in the pretrial order of course there will be no objection to that, but otherwise the directions made by the Court, and the stipulations noted in the transcript, will stand as the pretrial order.

In accordance with our usual procedure the first thing to be done is a statement and a crystallization so to speak in narrow and concrete form, specific as possible, of the various issues, and I am going to follow the usual procedure we follow in this court in pretrials, and ask the plaintiff's counsel to make an opening statement setting forth his contentions both as to the facts and as to the law.

You may proceed, Mr. Saunders.

[fol. 3] OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

Mr. Saunders: Your Honor, I am handing to the Clerk what we have denominated as Plaintiff's Pretrial Statement, which I believe may go a long way to accomplishing what Your Honor asked be done as the first order of business here this afternoon.

The Court: This pretrial statement will be made a part of the pretrial proceedings.

You may proceed.

Mr. Saunders: As indicated in this pretrial statement, this is an action by the United States in Equity in which it seeks to obtain by order of the court comprehensive injunctive relief against the defendant, an agricultural cooperative association of milk farmers.

The relief sought is that which in the view of the Government will restore competitive conditions in the Washington area milk industry. The relief sought includes first and foremost the return insofar as possible to the status quo ante before the association's purchase of the assets, the physical assets principally, of Embassy Dairy.

Embassy Dairy was the fourth largest distributor of milk and milk products in this area. It has a history going back many years of being somewhat of an independent operator so far as dairies in this area are concerned.

Embassy Dairy bought little if any milk from defendant. [fol. 4] The Government believes that the evidence will show that this was the source of a good deal of concern to defendant because Embassy buying milk from other sources was able to underbuy and therefore able to undersell the dealers who purchased from the defendant. Actually, however, the defendant's acquisition of Embassy was but a part of a long-range series of activities on the part of the Association to give it a dominant position in the Washington area milk industry. Embassy's acquisition puts it now into the distribution business in which it was briefly some years ago a participant but for reasons best known to itself got out of the distribution business; but when Embassy became so much of a thorn in the Association's (the defendant's) side that it was deemed best to eliminate Embassy, the defendant decided to get back into the distribution business and did so by purchasing Embassy's assets.

This case seeks, therefore, the divestiture by the defendant of the assets acquired from Embassy which it now operates as the Embassy Dairy Division of defendant.

It seeks by court order changes in the Association's pricing policy, in its terms of sale which it imposes by virtue of its dominant position upon the purchasers and dealers in this market who now are also competitors of this defendant. It seeks further to have injunction ordered against further acquisitions by defendant; also against continued [fol. 5] and further violations of the antitrust laws.

The Court: Well, of course, that last is a dragnet.

Mr. Saunders: It is, Your Honor, I suppose, yes.

The allegations of this complaint are founded upon Sections 1, 2, and 3 of the Sherman Act and Section 7 of the Clayton Act.

Section 1 prohibits contracts and combinations, or conspiracy, in restraint of interstate trade.

Section 3 prohibits any restraint of trade between the District of Columbia and the states.

Section 2 prohibits the monopolization or attempts to monopolize trade or commerce among the several states, both of which are alleged in this complaint.

Section 7 of the recently amended, that is to say, in 1950, so-called antimerger statute, which prohibits acquisitions of assets or stock of corporations in commerce where the effect may be substantially to lessen competition and create a monopoly.

The Court: That was the section that was involved in the recent DuPont case.

Mr. Saunders: It is, Your Honor, yes. The Government's complaint is founded, therefore, upon alleged violations of those four sections of the antitrust laws.

The Government contends that with respect to the Section 2 violations, the monopolization violations alleged that [fol. 6] this defendant has by virtue of every device it could conceive of attempted to exclude and eliminate persons desirous of engaging in the milk business in the Washington, D.C. area when they would not comply with the conduct of their business to conform to the Association's plans or desires.

The Association, defendant, is alleged to have excluded other farmers, not members of the Association; competing agricultural cooperatives who desired to sell milk into this market, as well as to have coerced and intimidated dealers either in order to secure them as customers or to prevent them from conducting their business in the area.

The Association has attempted to monopolize on a number of occasions principally to exclude competition.

With respect to the alleged Embassy acquisition there are two counts, namely, that the acquisition agreement itself and a related contract by a number of persons related to the Embassy business, contracts by them not to compete,

that those two contracts were made for the purpose of eliminating Embassy and restraining trade.

The Court: Let me see if I understand you correctly. Do I understand you to say that the acquisition of the assets of Embassy it is claimed to have been for the purpose of eliminating competition?

Mr. Saunders: It is claimed to have been for that pur- [fol. 7] pose or and with the effect of eliminating competition.

The Court: In other words you contend that is a violation of Section 7 of the Clayton Act.

Mr. Saunders: We contend that the acquisition agreement is a contract in violation of Sections 1 and 3 of the Sherman Act and that the acquisition also had the proscribed effects of Section 7 of the Clayton Act.

The Court: In other words, it is a violation of all three statutes.

Mr. Saunders: That is correct, Your Honor.

The Court: I think that crystallizes the issue as to the Embassy acquisition.

Mr. Saunders: Now, in connection with that, Your Honor, I would like to point out, however, that in stating it that way something may be lost sight of, and that is the fact that the burden of proof in connection with establishing a violation of Section 7 is much different from that required to establish a Section 1 or a Section 3 Sherman Act violation, because the Clayton Act, Section 7, speaks in terms of where the effect may be and it calls for a determination by the Court of the probable effects notwithstanding those which may at the time be evidenced.

The Court: How do you distinguish that from the Sherman Act?

Mr. Saunders: It is clear from the legislative history, [fol. 8] Your Honor.

The Court: Just tell me briefly.

Mr. Saunders: I happen to have brought with me, for Your Honor's convenience and I would like to hand them up to you, reports of the Senate and House Committees just prior to the enactment of Section 7, which you may desire to keep for convenience in future reference.

The Court: I understand your point with respect to Section 7 of the Clayton Act, but how does it differ in its effect from the provisions—

Mr. Saunders: As the legislative history makes clear, Your Honor, you don't have to have a full-blown restraint in order to have a violation of Section 7.

The Court: I think that was pointed out by the Supreme Court in the DuPont case.

Mr. Saunders: That is correct.

Section 7 was designed to arrest restraints from monopoly in the incipiency, as the report makes clear, and I think that is a consideration which we should bear in mind as we proceed.

I have addressed myself just a moment ago to the matter of the contract alleged to be in restraint of trade. Now, somewhat broader than the mere making of the acquisition agreement is the alleged conspiracy violation of Sections 1 and 3 which is alleged to have been entered [fol. 9] into by the defendant and by the seller of the Embassy assets and by other persons and corporations, which conspiracy it is alleged was directed to the elimination of Embassy as well as to the foreclosure or diversion from the Washington, D.C. market of suppliers, 125 independent farmers, for example, who supplied Embassy; of suppliers in other states who were foreclosed from this market when the defendant took over the operation of the Embassy facilities and put its own milk exclusively into those channels.

The Court: Now, I understand your contentions as to the Embassy, but you have a great many general allegations in the complaint and in your pretrial statement, and to some extent in your oral opening statement, about contracts in restraint of trade and the elimination of competitors, and so on; do I understand that all hinges on the Embassy?

Mr. Saunders: No, Your Honor. I want to correct any misunderstanding as to that. Embassy is an important part, but a part of what this defendant is alleged to have done.

The Court: Then I think it might be helpful if you were a little more specific as to what transactions and what

contracts you complain of in addition to the Embassy transaction.

Mr. Saunders: Your Honor, the defendant is alleged to have engaged in a course of conduct in respect to the [fol. 10] monopolization allegations, which course of conduct will be shown by various types of evidence to have the effect of monopolization.

The Court: I think it would be helpful if in the pretrial you stated concretely and specifically just what course of conduct you charge the defendants with. I think the purpose of pretrial, in part, is to make the issues more specific and particular than they are made by the pleadings.

Mr. Saunders: I direct Your Honor's attention to page 6 of our pretrial statement where under V we set forth very generally what the Government regards as the ultimate issues in this case, and then in an attempt to be more helpful to the Court in connection with this pretrial under VI below we try to get down to a little bit more specific statement of the issues.

The Court: Well, Arabic 1 of the paragraph is specific, and so is No. 2, but as to paragraph 3 I think you ought to state who you charge the defendant conspired with, and what competition did they eliminate or attempt to eliminate and foreclose.

Mr. Saunders: Your Honor, the co-conspirators are alleged specifically by name in the complaint, in Paragraph 24.

The Court: I see. Very well, you have answered that. [fol. 11]. And do you also allege what competition you endeavored to eliminate? When I say "you", I mean the defendant endeavored to eliminate.

Mr. Saunders: The Government contends, and I believe it is spelled out in effect in the complaint, but in effect, to sum it up, the Government contends that competition has been eliminated, or foreclosed, or substantially lessened at the production supply level, if we may use that appellation for the level of industry at which milk is produced and supplied to the dealers and then sell it to the public, the Government contends that competition has been substantially affected at that level.

The Court: Competition between whom?

Mr. Saunders: Between the defendant and all other actual or potential competitors for the sale of milk to this market, Your Honor.

The Court: I think you ought to make your statement a little more specific: How much competition was there? And to what extent has it been diminished, or eliminated? What competitors, if any, were excluded, and so on. I think that ought to be all here so that we will narrow the issue and know just what we will find.

Mr. Saunders: Your Honor, I want to be helpful. Of course to specify by names, if that is what Your Honor seeks, it seems to me, Your Honor, that almost entails a [fol. 12] bill of particulars which I frankly feel ought not to be given orally. Now, in an attempt to be helpful—

The Court: The Court is perfectly willing to give you an opportunity to give it in writing if you prefer.

Mr. Saunders: We are a little amazed, Your Honor, that the defendants have undertaken no effort at discovery in this case, a case that has been pending for ten months, and for counsel for the Government to be required to stand up here this afternoon and detail—

The Court: Well, as far as a bill of particulars is concerned, this being a civil case there is no bill of particulars; but we use pretrial for the purpose of crystallizing the issues in a very specific way, and it is really in a sense a substitute for the old-fashioned bill of particulars. I can see where in a complicated case such as this you might want an opportunity to state those matters in writing in order that you might not overlook something in an oral statement, and if that is what you prefer I think you should have that opportunity.

Mr. Saunders: Of course I am glad to avail myself of that opportunity. I might say, in order to be helpful this afternoon, without being limited to this as a final statement, the Government contends that the removal of 125 independent farmers as suppliers to this market, which was the result of the Embassy acquisition—

[fol. 13] The Court: Now, that is something specific.

Mr. Saunders: —And of the suppliers of Embassy located beyond the Washington milk market, as such, was one of the substantial effects of the acquisition, and in

that respect of course accounts for the elimination of substantial competition; but with respect to designation by name, I certainly prefer not to have to do that today.

The Court: Well, I can appreciate that situation, and I would be very glad if you would furnish within a reasonable time that we can set at the termination of today's session, a document giving the specific names because it isn't merely in the interest of both parties but it is in the interest of the court to make the issues as narrow and specific as possible, because the narrower and more specific the issues the shorter the trial will be, and that of course is the desideratum.

Does this complete your opening statement?

Mr. Saunders: Well, as an opening statement, yes, Your Honor.

The Court: Then I think we will take our usual mid-afternoon recess.

(Following brief recess.)

The Court: Defendant's counsel may make their opening statement.

[fol. 14] OPENING STATEMENT ON BEHALF OF THE DEFENDANT

Mr. Hughes: If Your Honor please, we feel that Your Honor has stated to Government counsel some of the things which are of concern to us in connection with the complaint.

It is significant to us, Your Honor, that Government counsel has devoted himself factually to the part of the complaint concerned with the purchase of Embassy Dairy, and we have much less trouble with that part of the complaint than we do with the broader allegations under the prior part commencing at Page 1, namely, Sections 1 and 2 of the Sherman Act.

The Court: Government counsel has to some extent narrowed those allegations in his opening statement, and he will furnish a written statement of names and dates and contracts that he claims were illegal.

Mr. Hughes: Well, that would be extremely helpful to us, Your Honor.

The Court: Now, I would like to hear from you as to what your defense is.

Mr. Hughes: Well, this is, Your Honor, in the nature of things, in view of the broad charges made in paragraphs 21 and 22, we have denied of course that we have committed any acts by way of monopoly, or attempted monopoly in any way.

The Court: Of course a general denial is adequate for [fol. 15] pleadings but it is not adequate for pretrial. Now, just what position do you take, specifically?

Mr. Hughes: First, Your Honor, we claim that in respect of the monopoly which he alleges we have obtained in the furnishing of milk, that under the Capper-Volstead Act, we are entitled to a monopoly if we obtained the monopoly properly within the antitrust acts and commit no acts by conspiracy with outside parties in marketing our members' milk.

In other words, it is impossible for an agricultural association, a cooperative, to function as a cooperative with any degree of success whatever unless it has almost a monopoly of the market, and we claim we are entitled to that.

The Court: Now, that interests me; I don't know why that should be so. A cooperative, I always understood, was a group of individuals who operate for their own benefit, without profit.

Mr. Hughes: That's true.

The Court: Then why do they have to have a monopoly?

Mr. Hughes: That is true, Your Honor; the producers join the cooperative and the cooperative as their agent sells their milk. Now, in order to sell their milk effectively it happens in practice, and we expect to prove this at the trial, that you can't do it effectively unless you have a substantial monopoly of the market, because if you don't [fol. 16] have it the destruction of your going price, let us say, very quickly ensues.

Now, representing these producers as we do we feel that we have a right to get what we can for their product, and so we claim we are immunized under the Capper-Volstead Act.

Now, I might say in that connection this, Your Honor: The Department of Agriculture has over a long period of years encouraged the formation of cooperatives and has encouraged and frankly admitted that a cooperative cannot operate effectively unless it has a monopoly position in the market, and we hope to prove that with the least possible difficulty and with the expenditure of the least possible length of time, and I am engaged in getting that data.

The Court: You claim that act does not apply to agricultural cooperatives.

Mr. Hughes: We claim that under the Capper-Volstead Act, Your Honor, the monopoly provisions of the Sherman Act don't apply at all if, and I say this with a saving clause, if we don't violate the Sherman Act in obtaining that monopoly. That is open for discussion.

The Court: I think I have held that a combination between producers of agricultural products into a cooperative, and a contract between two cooperatives, is not within the ban of the Sherman Act, but what is your [fol. 17] position on this question of law when, if it be the fact as the Government contends, that what the cooperative did was to make contracts that would exclude competitors who are not members of the cooperative?

Mr. Hughes: Well, we deny that any such contracts exist, Your Honor.

The Court: I understand, but on the question of law you do not contend that the saving provisions of the Capper-Volstead Act would save you from that kind of transaction, do you?

Mr. Hughes: Well, I say this, Your Honor: If we were to make an onerous, a spurious, a vicious contract—

The Court: Well, without using opprobrious adjectives—

Mr. Hughes: Well, what I am getting to is this, Your Honor, that if in the course of marketing our members' milk in a legitimate way the end result might be to exclude people from the market, we say we have the right to do it; it's just too bad.

The Court: But suppose you took affirmative steps to

exclude competitors, you would not take the position, would you, that you are not within the Sherman Act?

Mr. Hughes: I don't think, Your Honor, we would have the right to exclude competitors formally, deliberately, as a part of a conspiracy to exclude, no; I would have to be [fol. 18] frank about it.

The Court: The Embassy was not the type of concern that is covered by the dispensation from the Sherman Act.

Mr. Hughes: Well, as to that, Your Honor, we claim that it has been the consistent practice of cooperatives since the Capper-Volstead Act was passed in 1922 to acquire retail outlets.

The Court: I know, but the Embassy itself was not specifically within the Sherman Act, was it?

Mr. Hughes: It was not a cooperative, no.

The Court: It was not a producer.

Mr. Hughes: No, I don't think so.

The Court: Very well. What position do you take as to the application of the provision of Section 7 of the Clayton Act to the purchase of the assets of Embassy Dairy by the defendant? Do you contend that that is free from the prohibition of the Sherman Act, or do you claim merely as a matter of fact it didn't intend to create a monopoly?

Mr. Hughes: Well, we claim, Your Honor, that under the provisions of the Capper-Volstead Act we have a right to market our members' milk, and we are not restricted to the Government theory that we can grow only by the governmental method of acquiring new producers. We say that the Agriculture Department over a long period of years has encouraged cooperatives, and still does, in- [fol. 19] cidentally, to acquire retail outlets.

The Court: How about Section 7 of the Clayton Act, which was amended in 1950, what position do you take as to the applicability of that provision to the acquisition of Embassy Dairy?

Mr. Hughes: We say, Your Honor, that being a cooperative we have the right to acquire a retail outlet to market our members' milk.

The Court: Is it your contention that Section 7 of the Clayton Act does not apply to the acquisition by an

agricultural cooperative of the assets of another corporation that would tend to create a monopoly?

Mr. Hughes: Absolutely, Your Honor; that is our position.

The Court: In other words, your position is that as a matter of law you are not within Section 7 of the Clayton Act.

Mr. Hughes: That is true, Your Honor; we claim that. We claim that we are entitled to, and we are encouraged by the Government to obtain a monopoly.

The Court: Well, I just wanted to pinpoint your legal position.

Mr. Hughes: That is the point.

The Court: Your legal position is that you are not within Section 7 of the Clayton Act as far as the Embassy [fol. 20] Dairy transaction is concerned.

Mr. Hughes: That is the point, Your Honor.

The Court: Do you admit that that transaction as a matter of fact had a tendency to create a monopoly?

Mr. Hughes: No, we don't admit that at all, Your Honor.

The Court: You don't admit that at all?

Mr. Hughes: No. As a matter of fact we had a monopoly prior to acquiring Embassy, and Embassy increased the percentage a little bit, and later we lost the percentage that Embassy increased, and now we are right back where we started factually.

But to get back to the first part of the complaint, Your Honor, I wonder if I could invite your attention to page 6 of the complaint and the allegations in there of violation of Sections 1 and 3 of the Sherman Act, and you will notice in Paragraph 21, Your Honor, the Government undertakes to go back to 1930. We think that the Government should limit itself to some more reasonable time and we feel that the prior cases that the Government has brought against us have eliminated some of the specific means which are alleged down in Paragraph 22.

Now, if the Government proposes to go back to 1930 I think it should be asked to state just what transactions in that period of time it proposes to utilize.

[fol. 21] The Court: I think that the Court has already indicated that the Government is to furnish, within such time as we will fix at the end of this hearing, a specific statement of every transaction of which it complains.

Mr. Hughes: That is entirely satisfactory to us, Your Honor, if that is the end result.

The Court: Have you any other defenses?

Mr. Hughes: Oh, yes. We claim, Your Honor, in our answer several other defenses based on, well, what I have just referred to a moment ago, namely, primary jurisdiction.

We claim that under the Capper-Volstead Act the primary jurisdiction for many of these charges is vested in the Secretary of Agriculture, a point not decided as yet in our opinion.

Second, we claim that the Clayton Act, whose provisions Your Honor is familiar with—you dealt with them in the last criminal case—and which is somewhat coextensive with the Capper-Volstead Act along the same line is applicable.

Then, in addition, Your Honor, the District of Columbia Code has a section which permits the organization of cooperatives and states in so many words that they are not conspiracies, and it's of some value.

The Court: What is the provision of the District of Columbia Code?

Mr. Hughes: Title 29, Section 842.

[fol. 22] The Court: Well, there is no contention, as I understand it, on the part of the Government, that a cooperative is per se a conspiracy. My understanding of the Government's contention is that it is claimed that this particular cooperative did certain things in violating the Sherman Act.

Will you give me the section number again?

Mr. Hughes: Section 842, Your Honor.

The Court: Section 842 provides that:

"No association, or method or act thereof, which complies with this chapter, shall be deemed a conspiracy or combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily."

Do you claim you complied with that chapter?

Mr. Hughes: Yes, Your Honor, we do. And with deference I would ask to be allowed to develop that later on because it is a rather complicated technical argument, but we do claim we have complied with it, although we are a Maryland corporation.

The Court: That is a question of law.

Mr. Hughes: We are licensed and entitled to do business here in the District of Columbia and we think we have complied with the statute. It is a question of law, as Your Honor says.

[fol. 23] The Court: Well, that really adds nothing to the provisions of the Federal statutes that a cooperative is not per se a conspiracy in restraint of trade, so I think I see your point.

Is there anything else?

Mr. Hughes: Yes, Your Honor. In our seventh defense, on page 10, we appeal to the Agricultural Marketing Act.

You see, over a long period of time, in the period intervening between 1930 and when this suit was filed, we were under a Federal order.

The Court: But you are not any more, are you?

Mr. Hughes: No, we are not now, although we have applied to return to a Federal order, and the Department of Agriculture has it now under consideration. Our producers voted to put themselves back under Federal order.

The Court: How long since you have been under such an order?

Mr. Hughes: 1947, I think, Your Honor.

We claim that many of the activities complained of were done under a Federal order and are immunized.

For instance, in the Rock Royal case the Supreme Court said in so many words that there is no objection whatever to a cooperative obtaining a monopoly if it does so under a Federal order.

[fol. 24] Then the eighth defense deals, Your Honor, with the fact that we think some of these charges against us have already been decided, inferentially at least, by the disposition of the case tried in 1950 and nol prossed by the Government. The indictment was voluntarily nol prossed by the Government in 1952.

The Court: Well, a nol pros is not res judicata.

Mr. Hughes: It is not what, Your Honor?

The Court: A nol pros is not res judicata.

Mr. Hughes: No, Your Honor, of course I don't think it is res judicata in any technical way, but where you have had extensive charges aired in court and disposed of by the trial court and by the appellate court I think it is a factor to be considered.

The Court: But if an indictment is nol prossed, or a civil suit is dismissed without prejudice, that does not prevent the bringing of another suit or returning another indictment.

Mr. Hughes: That is quite true, Your Honor, but of course some very substantial law was made by Your Honor prior to that nol prossing.

For instance, on page 7 of the complaint, paragraph i. says that the defendant:

"Sought and urged action by Governmental agencies for the purpose of excluding or eliminating competition." [fol. 25]. And Your Honor had that question squarely before you on that case; and then the Court of Appeals held that utilization of full supply contracts, and things of that sort, were not any part of an actionable conspiracy.

We feel that under Your Honor's ruling that dates, facts and transactions must be furnished by the Government in respect of these lettered subparagraphs under Paragraph 22 it may solve the entire problem and we may not have to have further difficulties.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Saunders: Your Honor, you have been very helpful in shaping up some issues here, so far as the Government is concerned.

I have a question or two which perhaps might not be amiss at this point.

You asked Mr. Hughes, for example, whether it was the theory of the defendant, and the contention of the defendant, that a cooperative could do various things which gave it a monopoly, acquired a distribution business, and the like, and Colonel Hughes variously mentioned, If

they do it in a legitimate way, if they do it properly, and so forth. And I was hoping Your Honor would ask one more question which would help I think to clarify the air for all of us. And I would like to ask, through Your Honor, Colonel Hughes, if he would contend that, as Your Honor said, if the cooperative deliberately made [fol. 26] a move, took action to exclude someone from the market, would they contend that notwithstanding that they are exempt under the Capper-Volstead Act?

The Court: What kind of move?

Mr. Saunders: Suppose, Your Honor, for example, the cooperative in order to keep a customer when the customer was thinking about selling his business, said, We will pay you $25,000 more than anybody else, just name the top price. Or, suppose it said, when the firm Embassy wanted to put up a distribution plant in Fairfax, Virginia, suppose the attorney appeared before the Fairfax Zoning Board and said, We don't want this zoning allowed because Embassy doesn't do business the way our farmers here in Fairfax do it, and the member of the Zoning Board says, Do you mean you want to keep out competition? Is that why you oppose the zoning? And the counsel for the Association says, Yes. Those, I submit, are deliberate acts, and I would like to know—

The Court: I think you have sufficiently illustrated your question. Do you care to answer that, Colonel Hughes?

Mr. Hughes: I am sorry, but I have got to have facts before I can answer a question.

The Court: I appreciate it is a hypothetical question and that is why I asked whether you would care to answer it.

[fol. 27] Mr. Hughes: I would beg to be excused, Your Honor, at this time.

The Court: I want to ask you this, Mr. Saunders. Would it be helpful in this case if you limited issues to the time when this defendant went out from under the marketing order, which was in 1947?

Mr. Saunders: I don't think there is really any issue between the parties, Your Honor, as to that market order. We concede, I will concede right now, that certain acts of the defendant, when done pursuant to that marketing

order were perfectly legal, but the marketing order did not regulate every last thing that the defendant did.

The Court: How much time do you need, Mr. Saunders, to prepare such a specific statement as has been stated?

Mr. Saunders: Your Honor, a minimum of thirty days.

The Court: I think that is reasonable. Then such a specific statement as has been indicated by the Court heretofore in this afternoon's session will be furnished by the Government to defense counsel and filed within thirty days.

There is another thing that I would like to have done, in the interest of simplifying the issues, and I want to pursue the same course as I have done in a few other long and complicated cases and which I have found to be very useful in shortening proceedings.

As a beginning, at the outset it puts some labor on [fol. 28] counsel, but it is the kind of labor that they would have to do eventually anyway.

I would like to have each side set forth in a series of succinct, objective paragraphs facts which they feel their opponent should stipulate. They may be facts of record but they need not be limited to facts of record. You may have several hundred paragraphs, I don't know. They may relate to such matters as percentage of competition, or so forth. I want counsel for each side to furnish such proposed stipulations to opposing counsel, and the opposing counsel to mark opposite each paragraph which counsel is willing to stipulate. Then we will have another adjourned hearing as to all those paragraphs that are not stipulated, in the hope of seeing whether we can stipulate some more paragraphs. In that way I think we can eliminate a tremendous amount of testimony. How much time would you gentlemen need for that purpose?

Mr. Bergson: May I be heard on that?

Any such proposed stipulation that we would furnish would have to await the furnishing of the bill of particulars, or the particulars that you have suggested.

The Court: Well, suppose that such proposed stipulations be exchanged with sixty days. You will have thirty days to prepare the itemized statement and then thirty more days for the preparation of such stipulation,

and I hope you will make that proposed stipulation just [fol. 29] as long as you can; put in it any possible fact that you can; but in order to secure a stipulation do not put any argumentative twist or insinuation in any of those paragraphs because that destroys the chances of a stipulation. Make those statements purely objective and colorless and put each fact into a separate paragraph so that each paragraph will be two, three, four, five, or six lines long.

The Court observes from the Government's statement a suggestion as to stipulation as to statistical evidence. I think that should be done. It is suggested by the plaintiff that all statistical evidence be served on opposing party not later than 45 days in advance of trial, and that the opposing party be given 15 days in which to accept or reject such evidence: I think that is excellent, only I would rather fix the time limit dating from today rather than dating back from the date of trial.

Mr. Saunders: Your Honor, in connection with that I think I may at this point speak for my brother on this: Until discovery is completed, and as Your Honor may observe from my statement, we are still awaiting—that discovery is not completed—

The Court: Very well. I shall make a requirement in accordance with this proposal but I will fix the time within which it should be complied with at a later date.

Now, there is a proposal as to documentary evidence, [fol. 30] which it was the Court's intention to bring up anyway.

It will be the order of the Court that at a time to be set, perhaps at a later time, each side will prepare a list of all of the documents that it intends to introduce at the trial, and serve a copy of that list upon opposing counsel. Now, if the document is of a nature that copies of it would not be available to opposing counsel, then copies should be annexed to the notice.

Now, my purpose in requiring this, and I have been requiring it in all long cases as a policy, one of the great sources of consumption of time in a long trial with a great many documents is that as the document is offered in evidence opposing counsel reads it; he has to have

that opportunity; and if it takes him five minutes and you multiply that by one hundred documents you see how much time goes by.

My reason for making this requirement is not only to assist counsel but to assist the Court, with the thought that opposing counsel could familiarize himself with the documents and the list so that as they are offered in evidence it will not be necessary to stop to read them, and if there is any objection the objection will be made right then and there from notes that the counsel has prepared in advance.

I also want counsel in offering documents in evidence, especially lengthy documents where there might be only one statement out of several pages that is of any im- [fol. 31] portance, to mark either with a blue or red pencil the particular statements in the documents that counsel desires the Court to take into consideration.

I think, gentlemen, that all these matters will facilitate preparation of trial, but more important from the Court's standpoint, will shorten the time of the trial considerably.

Now, there is one other thing. It occurs to the Court that it would be very helpful to determine the question of law as to the applicability of the Sherman Act and the Clayton Act to this proceeding in advance of the trial, and argue that as a question of law. The question is an open one.

What I decided previously in this regard was merely that an agreement between two agricultural cooperatives is not per se within the Sherman Act any more than an agreement between several agricultural producers, but that does not necessarily determine the question as to whether Section 7 of the Clayton Act applies—that is an entirely different question—nor does it determine what things a cooperative may do and still not be within the Sherman Act. So it seems to me that after the preparation has made further progress it might be helpful if the question of law was argued in advance of trial and determined in advance of trial.

I would be very glad to hear comment of counsel on [fol. 32] that.

Mr. Saunders: I think there is a good deal of merit to

it, Your Honor. I perceive certain problems in connection with it.

The Court: I wouldn't want to hear such an argument until you complete your statement and then we could determine to what extent they are or are not within the Sherman Act.

Mr. Saunders: And with what result, may I inquire?

The Court: What is that?

Mr. Saunders: What would be the purpose of determining that if possible in advance of trial?

The Court: Well, suppose for example I hold that certain items are permitted under the Capper-Volstead Act and are not within the prohibition of the Sherman Act, they would be eliminated from the trial. On the other hand, if I should hold that all of the acts charged, if proved, are within the Sherman Act, then that would serve as a guide in the trial.

It seems to me that we might be confronted with a great deal of wasted time and money if we prove some acts which afterwards the Court should hold are within the dispensation of the Capper-Volstead Act and therefore not within the Sherman Act. That is what the Court has in mind.

Have you gentlemen any view on that?

Mr. Hughes: We would be glad to cooperate with Your [fol. 33] Honor in that respect. I feel first, as Your Honor intimates, the discovery processes should come to an end.

The Court: Oh, yes.

Mr. Hughes: And then, secondly, of course in order to determine let us say the question of whether under the Capper-Volstead Act a monopoly is licit maybe certain economic data would have to be submitted to Your Honor.

The Court: But my thought would be that we could determine the question of law after such an itemized statement as Government Counsel are going to furnish is furnished, as though it were a demurrer as to whether the Sherman Act or the Clayton Act were applicable to those acts, and I think that would narrow the issues considerably.

Mr. Bergson: I think one difficulty with that procedure, Your Honor, is that we might want to adduce affirmative

proof that we wouldn't have available to us in the nature of a demurrer which would show perhaps that a transaction was not within the act.

The Court: Well, I threw out this suggestion for discussion. It might be you would feel that the question should not be determined until the proof is in, and if that should be so my suggestion would not be workable.

Mr. Bergson: I would like to suggest an intermediate course of action.

The Court: Beg pardon?

[fol. 34] Mr. Bergson: I would like to suggest an intermediate course of action.

The Court: What is that?

Mr. Bergson: And that is that we reassess this question after the preliminary material is in to see whether or not under those circumstances it is feasible to go along with Your Honor's suggestion.

The Court: Yes, I think that is a good idea, but anyway this is something I would like to have counsel think about because I think in a long case like this, or in any long case, it is very useful if the question of applicable law can be determined, insofar as it is possible to do so, insofar as that does not depend on evidence, if it can be determined in advance and narrow the scope of the trial.

Then I think where we stand now is that we have fixed time of thirty days for the Government to furnish its specific statement, and thirty days more for exchange of proposed stipulations. How much time would counsel need for passing on the proposed stipulations? Say fifteen days? Or do you want more? I don't want to limit you particularly.

Mr. Saunders: May I suggest this? Our relations with counsel for defendant have been the best, I might say. Suppose it be left this way, if it is agreeable to Your Honor, that we see how big a task it is, and confer among ourselves [fol. 35] and see if we can make an agreement as to how much time we should have before we ask Your Honor to set down our differences for a hearing.

The Court: I think that is an excellent idea. Then after these proposed stipulations are exchanged we will have another session at which time we will try to see if any more

stipulations can be reached than those that have already been reached.

I suggest this, in view of the last statement, which the Court appreciates, that counsel notify the Clerk when they are ready, as outlined, for the next session, and an early date will be promptly set.

The Court appreciates the cooperation of all counsel. I think we are making progress and all of you have been very helpful.

Is there anything else anyone wants to bring up?

Mr. Saunders: Yes, Your Honor, if I may take just a moment more of the Court's time, I have a loose end. In going over our pleadings, Your Honor, we have made an effort today to try to narrow the issues and we will, I see, have to do something more than we have done, and which we will do; we have a question in our minds whether or not the pleadings of interstate commerce might not be made a little more explicit and I would like, therefore, to ask leave of the Court to make what I consider to be a minor amend-
[fol. 36] ment to Paragraphs 17 and 20 in the complaint. I would like leave of Court to amend Paragraph 17 by striking in the fourth line thereof the words "Interstate trade and commerce," and substitute the following: "an integral part of interstate trade and commerce, and has constituted and does constitute trade and commerce between a state or states and the District of Columbia."

The Court: I presume there is no objection. I will allow the amendment.

Mr. Hughes: I have no objection to the amendment, Your Honor, but we would like to consider what our position is on that. In other words we would rather not deny it or admit it or anything else at this minute, but think it over.

The Court: Very well.

Mr. Saunders: With respect to Paragraph 20, Your Honor, to amend by striking in the third line the words "and between the District of Columbia and states of the United States," and substituting therefor the words, "or trade and commerce between the District of Columbia and a state or states, which latter commerce also constituted and does constitute an integral part of interstate trade and commerce."

The Court: The amendment is allowed.

Is there anything else any counsel wishes to bring up?

Thank you, gentlemen.

[fol. 37] (Thereupon at 3:45 o'clock p.m. the hearing was concluded.)

Reporter's certificate to foregoing transcript (omitted in printing).

[fol. 635] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4482-56

UNITED STATES OF AMERICA,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, Defendant.

Transcript of Proceedings of October 16, 1958

Washington, D.C.

The above-entitled action came on for further hearing before the Honorable ALEXANDER HOLTZOFF, United States District Judge, at 10:00 o'clock a.m.

APPEARANCES:

On behalf of the Government:
JOSEPH J. SAUNDERS, Esq.,
EDNA LINGREEN, Esq.,
JOSEPH E. WATERS, Esq.,
A. DUNCAN WHITAKER, Esq.

On behalf of the Defendant:
HERBERT A. BERGSON, Esq.,
WILLIAM J. HUGHES, JR., Esq.,
DANIEL H. MARGOLIS, Esq.,
DANIEL J. FREED, Esq.

The Deputy Clerk: United States versus Maryland and Virginia Milk Producers Association.

OPINION OF THE COURT—October 16, 1958

The Court: This is a civil action brought by the United States against the Maryland and Virginia Milk Producers Association, Incorporated, under the anti-trust laws, for injunctive and other similar relief.

Among the defenses pleaded by the defendant are assertions that under the Clayton Act and the Capper-Volstead Act the defendant is exempt and immune from the provisions of the anti-trust laws in respect to the activities of which the government complains.

A further defense is that the Secretary of Agriculture has primary jurisdiction of one of the activities concerning which complaint is made.

Pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, the Court has ordered a separate trial of these defenses in view of the fact that if they are sustained in whole or in part they may be finally dispositive of either the entire litigation or some aspects of it.

The complaint is not divided into separate counts, as the Rules permit, but it in effect sets forth three separate claims for relief or causes of action. Although they are not separately numbered in the complaint, they are in fact [fol. 637] separated.

The first cause of action, contained in Paragraphs 21, 22, and 23 of the complaint, alleges that the defendant has attempted to monopolize and has monopolized inter-state trade and commerce in supplying milk for resale as fluid milk in the area comprising the District of Columbia and certain areas in Maryland and Virginia adjoining the District of Columbia.

This cause of action is based on Section 2 of the Sherman Act, 15 U. S. Code, Section 2, which reads as follows:

> "Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or

commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor."

The second cause of action, pleaded in Paragraphs 24, 25, 26, 27, and 28 of the complaint, charges a combination and conspiracy to eliminate and foreclose competition in the Washington Metropolitan area by making and carrying out a contract for the transfer of substantially all of the assets of the concern known as the Embassy Dairy, which is a retail outlet for milk in the Washington Metropolitan area.

This cause of action is predicated on Sections 1 and 3 of the Sherman Act. Section 1 of the Sherman Act, 15 U. S. Code 1, reads as follows, insofar as is pertinent to [fol. 638] the issues of this case:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal."

Section 3 of the Sherman Act, 15 U. S. Code 3, reads in part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is declared illegal."

The third cause of action is found in Paragraphs 29 and 29(a) of the complaint, and charges that the defendant on July 26, 1954, purchased and acquired substantially all of the assets of the Embassy Dairy and that the effects of this acquisition have been and may be substantially to lessen competition or to tend to create a monopoly in the production and sale of milk to the Washington Metropolitan area dealers.

It is further charged that with the same effect the de- [fol. 639] fendant on December 6, 1957, purchased and acquired all of the outstanding stock of Richfield Dairy Corporation and Simpson Brothers, Incorporated.

This cause of action is founded on Section 7 of the Clayton Act, 15 U. S. Code 18, the pertinent portions of which read as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where, in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly."

As a result of lengthy and detailed discovery proceedings, as well as by proof at the trial, the following pertinent facts that are relevant to the defenses now being tried have been developed. The defendant, Maryland and Virginia Milk Producers Association, Incorporated, is a Maryland corporation having its principal office in the District of Columbia. It is an agricultural cooperative association, having as members nearly two thousand milk producers, that is, persons owning or operating dairy farms [fol. 640] at which milk is produced, most of the members being located in the States of Maryland and Virginia. The milk is delivered by each member to the defendant, who acts as the marketing agency for its members. Most of the milk is sold eventually to dealers in the Washington Metropolitan area. The defendant also owns a plant at which it transforms surplus milk into various milk products, such as ice cream. These by-products are shipped to other markets. The net worth of the defendant corporation is approximately five million dollars. Most of the members of the defendant corporation are natural persons. Some, however, are partnerships and some are corporations. Some of the members devote all or a major portion of their time and energy to operating their dairy farms

themselves. Some of them operate their farms through employees and are engaged principally in other occupations themselves.

The defendant claims to be exempt from the provisions of the anti-trust laws under two distinct statutes. The first is Section 6 of the Clayton Act, which became law on October 15, 1914. Its pertinent portions, 15 U. S. Code 17, read as follows:

> "Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations instituted for the purpose of mutual help and not having capital stock or conducted for profit, or to forbid or [fol. 641] restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof, nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws."

The second statute under which immunity is claimed is Section 1 of the Capper-Volstead Act, which became law on February 18, 1922. This provision, 7 U. S. Code 291, reads as follows:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers, may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in inter-state and foreign commerce such products of persons so engaged. Such associations may have marketing agencies in common and such associations and their members may make the necessary contracts and agreements to effect such purposes. Provided, however, that such associations are operated for the mutual benefit of the members thereof as such producers and conform to one or both of the following requirements. First, that no member of the association is allowed more than one vote be- [fol. 642] cause of the amount of stock or membership

capital he may own therein. Or, second, that the association does not pay dividends on stock or membership capital in excess of eight per centum per annum. And, in any case to the following. Third, that the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members."

The first question to be determined is, whether these two statutes or either of them are applicable to this defendant.

So far as the Clayton Act is concerned, it comprehends within its scope all agricultural organizations instituted for the purposes of mutual help and not having capital stock or conducted for profit.

Unquestionably, the defendant is an agricultural organization. It is instituted for the purposes of mutual help because it acts as the marketing agency for all of its members and pays over to its members the proceeds of the milk sales, with a deduction, of course, for overhead and similar expenses. The defendant does not have capital stock and it is not conducted for profit except as such profit may accrue to its members.

Clearly, therefore, the defendant is within the scope of the Clayton Act.

The next question is, whether it is within the scope of [fol. 643] the Capper-Volstead Act, which has been quoted.

As has been stated, that statute authorizes persons engaged in the production of agricultural products as farmers or dairymen to act together in associations, corporate or otherwise, with or without capital stock.

It is urged by the government that the words "dairymen" and "farmers" should be restricted to natural persons who personally work on dairy farms and who derive the major portion of their income from the farms.

The Court sees no basis for such a restricted definition. The owner or operator of a dairy is a dairyman, whether he personally works on his dairy or has the work done by employees. So, too, the owner of a farm may be regarded as a farmer even though he devotes the major portion of his activities to other pursuits.

When Congress desired to put a more circumscribed definition on the term "farmer" it did so expressly, as is true of the Bankruptcy Act.

The Court, therefore, is of the opinion that it is immaterial whether every member of the association personally works on his farm or whether every member of the association is a natural person or a corporation.

Under those circumstances, the Court concludes that the defendant corporation is of the type which is comprehended within the terms of the Capper-Volstead Act.

[fol. 644] The next question is, whether it qualifies under the provisos contained in the Act.

Taking first the third proviso, because that is applicable to all corporations claiming the benefits of the statute, namely, that the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members, it is not disputed that this condition is met.

As to the first and second provisos, the law does not require compliance with both but merely compliance with either one. The first proviso imposes a condition that no member of the association shall be allowed more than one vote. The proof shows that that condition has been complied with. It therefore becomes unnecessary to decide whether the second proviso is also complied with.

The Court, therefore, reaches the conclusion that the defendant corporation is entitled to the benefits of both the Clayton and the Capper-Volstead Acts and to the exemptions and immunities conferred by those two statutes.

The next question, and the main question to be determined, is whether these exemptions and immunities are sufficiently broad to cover the activities of which the government complains.

This brings us back to the precise provisions of, first, the Clayton Act, and then the Capper-Volstead Act.

[fol. 645] Section 6 of the Clayton Act, on which the defendant relies, 15 U. S. Code 17, provides in its pertinent clauses that:

> "Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of agri-

cultural organizations instituted for the purposes of mutual help and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects above, nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws."

If we compare these provisions with the provisions of Section 1 of the Capper-Volstead Act, 7 U. S. Code 291, which has been quoted above, we reach inescapably the conclusion that in effect the Capper-Volstead Act adds nothing to the immunities and exemptions of the Clayton Act except to extend them to corporations having capital stock and except to make the provisions of the earlier statute more definite and specific.

How far the exemptions and immunities of the two statutes extend is a question of novel impression. Although the Clayton Act was enacted as far back as 1914 and the Capper-Volstead Act as far back as 1922, this question has [fol. 646] not been definitely determined and is still open. Perhaps this circumstance is due to the fact that but few attempts have been made to prosecute agricultural cooperatives.

First and foremost the two statutes provide that an agricultural cooperative shall not as such be considered an illegal combination or conspiracy in restraint of trade under the anti-trust laws. In other words, such organizations are not per se illegal combinations or conspiracies in restraint of trade. This much is not disputed.

There is a controversy, however, as to whether the statute should be construed as not being limited to cover the mere existence of agricultural cooperatives but to extend to all of the activities of such corporations in connection with their legitimate agricultural business. An examination and scrutiny of the provisions of the statutes are required in order to solve this problem.

At the outset, it must be noted that the Clayton Act exempts from the anti-trust laws the existence and operation

of such organizations. It is not limited to their existence but includes both existence and operation.

Moreover, the last clause of the Clayton Act provides that such organizations or members thereof shall not be held or construed to be illegal combinations or conspiracies in restraint of trade. If that clause stood alone, we would be confronted with a different situation. But it is quite ap- [fol. 647] parent that the Congress, in enacting the Clayton Act, covered both the existence of such organizations as well as their activities and operations and exempted both from the anti-trust laws.

The same result is reached by an examination of the Capper-Volstead Act, which authorizes persons engaged in the production of agricultural products to act together in associations and authorizes associations and their members to make necessary contracts and agreements to effect their purposes.

Obviously, the Capper-Volstead Act is not limited to granting immunity to such associations in respect solely to their existence but extends likewise to their activities.

Support for this conclusion is likewise derived from the reports of Congressional committees in respect to the legislation involved in this case. Chairman Clayton of the House Committee on the Judiciary, in a report dated May 6, 1914, House Report Number 627, Sixty-Third Congress, Second Session, states, on page 36:

> "The object of Section 7 is to make clear certain questions about which doubt has arisen as to whether or not fraternal, labor, consumer, agricultural or horticultural organizations, orders or associations, organized for mutual help, not having capital stock or conducted for profit, come within the scope and purview of the Sherman Anti-Trust Law."

[fol. 648] . At page 38 he says that Section 7 of the bill will:

> "Recognize as legal the existence and operations of fraternal, labor, consumer, agricultural, horticultural organizations, orders or associations, organized for purposes of mutual help and not having capital stock or conducted for profit."

And then he adds:

> "It also guarantees to individual members of such organizations, orders or associations the right to pursue without molestation or legal restraint the legitimate objects of such associations."

The report of the Senate Judiciary Committee, filed by Senator Culberson on July 22, 1914, Senate Report 698, Sixty-Third Congress, Second Session, contains the following statement:

> "The other important and general purposes of the bill are to exempt labor, agricultural, horticultural and other organizations from the operation of the anti-trust acts."

The government argues that the exemption and immunity from anti-trust laws conferred upon agricultural cooperatives should be deemed to extend to certain types of restraints but not to others.

To say that it should extend only to reasonable restraints would be fallacious because no legislation was necessary to [fol. 649] permit reasonable restraints of trade. They are not banned under the anti-trust acts. Consequently, if any restraints are immune from the anti-trust acts as a result of the legislation we are considering, they must be unreasonable restraints of trade.

The government argues, however, apparently, that some unreasonable restraints, mild in character perhaps, should be permitted, whereas those that are more reprehensible and perhaps predatory should not be deemed exempt or immune under either the Clayton Act or the Capper-Volstead Act.

There is no basis in the statutes, however, for separating unreasonable restraints that would otherwise come within the provisions of the anti-trust acts into two categories and conclude that some come within the exemption and others do not. To reach any such conclusion would be for this Court to legislate by amending an act of Congress. This the Court cannot do because the Congress itself has not done it.

There are indeed well-recognized limitations on the immunities and exemptions granted by the legislation. The exemptions are accorded and immunities are conferred on agricultural cooperatives and their activities. When they step outside of their field and conspire with persons who are not producers of agricultural products, they are beyond the scope of the exemption. This was held by the Supreme Court in United States versus Borden Company, 308 U. S. [fol. 650] 188, 204, which was followed by the Court of Appeals for this Circuit in United States versus Maryland and Virginia Milk Producers Association, 85 Appeals D. C. 180, 182, where it was pointed out that a combination of producers and distributors, the latter not being within the terms of the statutes, is not privileged.

This distinction was pointed out by this Court in United States versus Maryland Cooperative Milk Producers Association, 145 Fed. Supp. 151, at 153-154, where the Court stated:

> "The obvious purpose of the Clayton Act was to liberate combinations of farmers and their cooperative organizations from the prohibitions of the anti-trust laws so long as they do not combine with others who are outside of this category."

The government relies on the cases of Local 36 of International Fishermen versus United States, 177 Fed. 2d 320, 332, and Gulf Coast Shrimpers and Oyster Association versus United States, 236 Fed. 2d 658, 664-5. Each of these cases, however, is distinguishable. The former involved a combination of fishermen and dealers and, therefore, a combination within the ban of the Borden Case. The latter presented a situation in which the association did not act as agency for its members but sales were made directly by members to dealers.

[fol. 651] It must be mentioned in passing, of course, that the exemptions and immunities extend only to provisions of the anti-trust acts. They do not confer any right to violate any other statute, criminal or civil.

Also, it must be borne in mind that the exemptions and immunities relate solely to activities in connection with

agricultural products. If an organization such as the defendant should step outside of that field and carry on business in products of a different nature, then the provisions of the Clayton and Capper-Volstead Acts would not apply.

But, subject to these exceptions, the Court is of the opinion that an agricultural cooperative is entirely exempt from the provisions of the anti-trust laws, both as to its very existence and as to all of its activities, provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities.

The public does have another remedy against what would otherwise constitute violations of the anti-trust laws. Section 2 of the Capper-Volstead Act describes a procedure whereby the Secretary of Agriculture may institute administrative proceedings and seek enforcement of his orders in the courts if he finds that such an association monopolizes or restrains trade in inter-state or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced.

[fol. 652] Obviously, this remedy is applicable in only a limited group of cases and the public is not protected against restraints of other kinds.

Moreover, an agricultural cooperative is apparently not subject to suit by a private person, as is the case with other persons whose activities come in conflict with the anti-trust laws.

Thus, it would seem that under the law as it now stands, an agricultural cooperative may monopolize articles of food and unreasonably restrain commerce in such commodities and the public receives no protection from the anti-trust laws except in a very limited way.

The Court is not unmindful of the fact that there may be serious dangers lurking to the public weal in this situation if a cooperative becomes too large or grows too powerful. Monopolies and restraints of trade are abhorrent to the genus of Anglo-Saxon jurisprudence and its institutions. Monopolies and unreasonable restraints of trade in the necessities of life such as food are particularly obnoxious.

This danger was pointed out on the floor of the Senate by the opponents of the Capper-Volstead bill, but without avail.

This subject is obviously within the jurisdiction of the Congress alone. For this Court to construe this Act in any other way than that in which it has been framed by the [fol. 653] Congress would be to amend the statute. Courts, however, may not legislate. Sometimes, indeed, there is a strong temptation for a court to do so and there have been occasions in which the temptation has not been overcome, but it must be resisted at all hazards.

By bringing this suit the government may have created a benefit to the public in that it has definitely pointed out a problem for the Congress to solve.

The Court, therefore, reaches the conclusion that the government has no cause of action under Section 2 of the Sherman Act and, therefore, the first cause of action alleged in the complaint will be dismissed on the merits.

This brings us to the second and third causes of action, which relate to the acquisition of the assets of Embassy Dairy as well as the stock of the Richfield Dairy Corporation and of Simpson Brothers, Incorporated.

The second cause of action alleges a violation of Sections 1 and 3 of the Sherman Act. It charges a conspiracy with certain persons who are not engaged in agricultural pursuits as defined in the statutes. These allegations are clearly within the exception of the Borden Case and, therefore, a cause of action is stated in respect to these activities.

The third cause of action relates to the acquisition of the assets of Embassy Dairy and capital stock of Richfield Dairy Corporation and Simpson Brothers, Incorporated, [fol. 654] and charges violations of Section 7 of the Clayton Act, 15 U. S. Code 18, the pertinent portions of which have already been quoted.

In brief, the statutory provision here involved prohibits any corporation engaged in inter-state commerce to acquire the whole or any part of the capital stock of any other corporation likewise engaged in inter-state or foreign commerce, and further prohibits any corporation subject to the jurisdiction of the Federal Trade Commission to acquire the whole or any part of the assets of another corporation engaged in inter-state or foreign commerce if the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

The defendant claims that this provision is not applicable to it because the Capper-Volstead Act empowers it to make the necessary contracts and agreements to effect its purposes.

The Court does not agree with this contention. It is a well-known principle of law that repeal by implication shall not be favored, and unless there is a clear repugnancy between the earlier and the later statute the two statutes shall be so construed as to give effect to both.

It is the opinion of the Court that the provisions of Section 7 of the Clayton Act, 15 U. S. Code 18, constitute a limitation on the authority of an agricultural cooperative [fol. 655] to make contracts as authorized by the Capper-Volstead Act.

The Court has no doubt that the defendant corporation is subject to the jurisdiction of the Federal Trade Commission and, therefore, within the terms of Section 7 of the Clayton Act, 15 U. S. Code 45.

The Court, therefore, reaches the conclusion that the second and third causes of action averred in the complaint are valid.

In conclusion, the first cause of action will be dismissed on the merits and the trial will proceed only as to the second and third causes of action.

A transcript of this oral decision will constitute the findings of fact and conclusions of law on the aspects of the case that were tried at this hearing.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Saunders: May I address the Court?

The Court: Yes, indeed.

Mr. Saunders: In view of your Honor's ruling—may I say in preface that it was understood, I believe, your Honor, that the trial would re-commence or commence on Monday.

The Court: Yes. Will you be ready to proceed or does either one of you wish more time?

Mr. Saunders: It's not exactly a question of more time, but in effect I am asking for it for this reason: In order to assess the effect of your Honor's ruling upon the evi-

dence and other questions which will be involved, I would [fol. 656] like to request the Court to permit the government to have until a week from Monday—

The Court: Is there any objection to that?

Mr. Hughes: No objection, your Honor.

The Court: Then we will recess the trial until a week from Monday.

Mr. Bergson: May I ask that your Honor enter judgment for the defendant on the—

The Court: If you desire a separate judgment, I see no reason why a separate judgment should not be entered. I will enter a separate judgment.

Now, gentlemen, I wish to say another thing. In view of the ruling today and the opportunity that this preliminary trial has given me to get a bird's-eye view of the entire case, when it comes to the trial on the second and third causes of action—and they are really the same, stated in different ways—which is entirely proper—I am going to limit the government's case-in-chief to the specific transactions complained of and I will not admit any evidence of earlier transactions, as the government contemplated.

Now, it is just possible that such testimony may become relevant in rebuttal, and if the case should take that turn, why, of course, I will admit it in rebuttal. But I don't think it is necessary to put it in the government's case-in-chief. [fol. 657] Now, it also seems to me that the government needs very little evidence to offer in support of these causes of action because most of the facts have been admitted in responses to requests for admissions or interrogatories.

I am not saying that I will exclude all oral testimony, but I urge the government to examine very carefully all of the admissions, and I think it is just possible that it will need no further evidence. But if it does, I want it to reduce the evidence to the minimum. I see no reason why the government should not be able to finish its case-in-chief in about half a day.

I would like to have within the next few days a complete set, as I have heretofore requested, of all of the fruits of discovery proceedings.

Mr. Bergson: Your Honor, may I interrupt there and ask

whether you wish to burden yourself with all the fruits of the earlier discovery, because there is so much of it—

The Court: I think your suggestion is a very helpful one. Such as bear on the second and third causes of action. If there is any doubt as to whether any particular admissions bear on the second and third causes of action, I would rather have it.

Now, is there anything further?

Mr. Bergson: Thank you very much, your Honor.

The Court: We will recess the trial, then, until ten [fol. 658] o'clock Monday morning, October 27th.

(Thereupon, at 11:10 a.m., the above-entitled trial stood adjourned.)

Reporter's Certificate to foregoing Transcript (omitted in printing).

[fol. 682]

[File Endorsement Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRANSCRIPT OF PROCEEDINGS OF NOVEMBER 10, 1958

[fol. 684] Proceedings

Deputy Clerk: Maryland and Virginia Milk Producers Association.

The Court: You may proceed, gentlemen. (Pause) You may proceed when you are ready.

OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

Mr. Saunders: May it please the Court: This is a proceeding brought by Plaintiff, United States of America against the Maryland and Virginia Milk Producers Association under the Sherman Act and Section 7 of the Clayton Act.

The Government seeks injunctive relief against the Defendant, including the divestiture of assets alleged to have

been unlawfully acquired by the Defendant, and cancellation of certain agreements to which Defendant is a party, and such other relief as is just and proper in the circumstances.

For convenience, the Court has previously divided the Government's complaint into what it has termed separate counts. The first count, setting forth claims for relief under Section 2 of the Sherman Act, was dismissed on October 16, 1958. Trial on the remaining counts, as they have been referred to, now commences.

The second count pleaded in paragraphs 24, 25, 26, 27 and 28 of the complaint, sets forth claims for relief under Sections 1 and 3 of the Sherman Act based upon Defen- [fol. 685] dant's unlawful combination and agreement with Embassy, Incorporated, to eliminate and foreclose competition in the milk industry in the Washington Metropolitan area. Section 1 of the Sherman Act, 15 United States Code, Section 1, provides in pertinent part as follows: "Every contract"—

The Court: You do not need to read that.

Mr. Saunders: —"combination or conspiracy in restraint of trade"— is declared by that statute to be illegal.

Section 3 of the Sherman Act, with which I assume your Honor is of course also familiar, pertains to combinations, contracts, conspiracies, where the restraint affects commerce in the District of Columbia or between the District of Columbia and a state or states, or between a state or states and the District of Columbia.

The unlawful combination and conspiracy which the Government charges under Sections 1 and 3 of the Sherman Act are directed is the agreement by and between Defendant and Embassy Dairy, Incorporated, which encompasses the sale of Embassy's assets to the Defendant; the removal from the Washington market as independent suppliers of milk of approximately 120 farmers who had been supplying Embassy independently of the Association, Defendant in this case; and in addition, of other suppliers. All of [fol. 686] this was attended by commitments by Embassy and others which were insisted upon by the Defendant, to the effect—

The Court: Let me see whether I follow you. Do I correctly understand that your contention is that this conspiracy or this transaction eliminated suppliers of milk?

Mr. Saunders: Yes, that is correct, your Honor. Approximately 120 farms who, prior to the acquisition, had been supplying Embassy directly with their milk independently of the Association.

The Court: Well, I suppose they did not guarantee to supply the Association with that milk, is that it?

Mr. Saunders: No, your Honor, they did not. The Association put its own milk into the Embassy plant immediately—

The Court: What happened to the milk that had been supplied by the producers who sold to Embassy?

Mr. Saunders: They made out as best they could, your Honor. Many of them had no choice but to join the Association and thus to ship milk to Embassy or to any other dairy to which the Association directed it. Many others went out of this market to the Baltimore market because the fact is there were few, if any, other outlets available at that time other than Embassy for these farmers.

The Court: Well, was the Association willing to absorb [fol. 687] all the milk—

Mr. Saunders: I think it would have been pleased to take them under their wing, your Honor, yes.

The Court: I see.

Mr. Saunders: In United States vs. Paramount Pictures, 334 U.S. 131, the Supreme Court states the test of legality under the Sherman Act of vertical integration of businesses: In that case at page 174 the Court observed that legality turns upon, first, the purpose or intent with which the integration is conceived; or, second, the power it creates and the attendant purpose or intent. The acquisition which is at the core of this case will be shown to have been an acquisition designed and intended by the defendant, not for legitimate business reasons, but in order to exclude the competition of Embassy at the distribution level of the Washington area milk industry and what is perhaps far more significant, to deny the outlet for milk represented by Embassy to any and all competitors of the defendant. For, as I have said, some 120 farmers who, for years, had

been supplying this milk independently to Embassy and suppliers from beyond the Washington market who, from time to time, or in one or two instances regularly shipped quantities of milk in, were cut off from that outlet.

[fol. 688] The Court: I want to be sure that I understand correctly your contention as to what competition was restrained. The competition between the Association and independent producers? Is that it?

Mr. Saunders: The competition of others than the Association in supplying this outlet. Also, at the retail level the competition of Embassy, a vigorous competitor as I will explain, your Honor, was cut off in the retail—

The Court: But your first contention is that competition between the Association and the producers who had not joined the Association was eliminated by the elimination of Embassy Dairy, is that the point?

Mr. Saunders: They were deprived of this outlet.

The Court: Have I correctly stated your contention?

Mr. Saunders: Yes, your Honor.

The Court: Very well.

Mr. Saunders: A brief sketch of the Washington area milk industry is in order at this point. The Washington Metropolitan area is a separate and distinct milk market, both at the supply and distribution levels. It was so recognized by the Secretary of Agriculture during the period 1940 to 1947 when a Federal Marketing Order was [fol. 689] in effect in this area. It is so because of the nature of the industry.

Virtually all of the fluid milk distributed to consumers within the Washington Metropolitan area is distributed by dealers whose plants are located in this area. These dealers, as a group, thus represent a definable market, a definable demand for the raw milk supplied by milk producers and those who deal in bulk milk.

If we look at the structure of the industry in the period prior to the acquisition—and let us take the first six months of 1954, January through June, the acquisition being consummated late in July—the Defendant supplied 85 per cent of all milk required by Washington Metropolitan area dealers. More than 120 farmers not affiliated with the Defendant, supplied approximately nine per cent. One

other cooperative association, a small one, not the defendant, of course, supplied approximately 5 to 6 per cent.

The Court: Tell me again the percentage supplied by the Defendant.

Mr. Saunders: Approximately 85 per cent for the period January to June, 1954.

The Court: You mean to the retail market?

Mr. Saunders: To the dealers, the firms who then take the milk, process it, pasteurize it, put it in bottles and [fol. 690] distribute it to consumers.

The Court: The consumers are the retail stores, is that right?

Mr. Saunders: Well, customers who receive milk at home, your Honor—stores, institutions, and the Federal Government which is a large consumer in this area.

The Court: But the Defendant sold to the persons who supplied the ultimate consumer, or did it sell to some middleman?

Mr. Saunders: Well, the middleman, you might say, is the dealer. The gradation of the industry is this: You have producers; then there are some persons who deal in bulk milk who get it from producers and they are also sellers. They supply it to dealers' plants where the milk is pasteurized, processed, put in bottles and then it is taken maybe to stores, maybe by retail routes to homes where it is delivered on the doorstep, and it is sold in bulk to institutions and to government installations.

The Court: Yes, but at what stage does the Association receive this milk?

Mr. Saunders: The Association is at the production or supply level, your Honor. It supplies 85 per cent at the first step in this process.

The Court: And it sells that milk to whom?

Mr. Saunders: To dealers. The dealers, in turn, sell it [fol. 691] to the consumers.

The Court: Yes, but by "consumers," do you mean the family, the housewife?

Mr. Saunders: The housewife—

The Court: Or, do you mean the retail store?

Mr. Saunders: Well, you might say there is an intermediate step but, for the purposes of this case, it makes

little difference we believe. It means both, really, so far as we are concerned.

The Court: Very well. I just wanted to clarify my own thinking about that.

Mr. Saunders: As I was indicating, your Honor, a small percentage of milk, although it was substantial, it was relatively small, was supplied by sources beyond the usual production area for this market, that is, from so-called Maryland and Virginia and Pennsylvania and, to some extent, West Virginia area.

Embassy Dairy, a Delaware Corporation, was the purchaser of an outlet for approximately ten per cent of all the milk which was resold as fluid milk by dealers in the Washington Metropolitan Area.

The Court: What aspect of the business was Embassy Dairy engaged in?

Mr. Saunders: Embassy was at the dealer-to-customer level. The Association was back one step.

[fol. 692] The Court: In other words, it was not really a dairy. The word "dairy" is a misnomer, is it not?

Mr. Saunders: Actually, there is a difference between, I guess, a dealer and a dairy farmer.

The Court: I always thought that a dairy was the milk producer.

Mr. Saunders: I think that might have been so, originally, but the firms call themselves dairies. It is very customary in the industry at the retail level for the distribution firm to call itself a dairy.

The Court: I see. I am afraid I was just misled by the term "dairy." So, Embassy Dairy was a retail distributor?

Mr. Saunders: A wholesaler. It was a dealer, a distributor.

The Court: It was a dealer. I see.

Mr. Saunders: Almost—

The Court: And, therefore, it would not be eligible to membership in the Defendant Association, would it?

Mr. Saunders: No, your Honor, it did not have farms.

The Court: Yes. It was not a producer.

Mr. Saunders: That is correct.

[fol. 693] The Court: The Defendant Association is an Association composed of producers, is it not?

Mr. Saunders: That is correct, your Honor.

The Court: Very well.

Mr. Saunders: Almost all of Embassy's milk was furnished by others than the defendant. Embassy sold milk throughout—fluid milk—throughout the Washington Metropolitan area. Perhaps, your Honor, for purposes of clarity, I should say that prior to processing, pasteurizing and the handling of the milk—which puts it into bottles—we refer to the product as milk. When it is transformed—and there is not too much of a transformation in many instances—into the product as your Honor may know it, we call it fluid milk.

As I was saying, Embassy sold milk throughout the Washington metropolitan area. I should say again, fluid milk. Embassy was aggressive. Embassy was ambitious. Embassy was an innovator. Embassy was a price-cutter. In short, Embassy was a substantial competitive factor in the Washington area milk industry. Embassy had, for many years, purchased milk independently of the Association to the extent that they could do so. There was a sound business reason for Embassy purchasing from others than the Association. Embassy could ordinarily buy milk more inexpensively when it dealt with others than when it [fol. 694] dealt with the Defendant. And by buying more inexpensively, Embassy could sell at a lower price to consumers.

The Court: Did it sell to the housewife at a lower price than other milk was sold for?

Mr. Saunders: At times it did, your Honor. Right prior to the acquisition its price at retail, I believe, was about the same as the other dealers. As our evidence develops, we will indicate the areas in which it was particularly a price competitor.

The evidence will show that Embassy's sales of fluid milk were in a rising trend during the year and a half prior to the acquisition. The evidence will show that Embassy, although it enjoyed approximately ten per cent of over-all fluid sales in the market, accounted for a far greater proportion of fluid milk sold to Federal installa-

tions in the Washington Metropolitan area than any other dealer in the area.

Now, as your Honor can conceive, I am certain, quite readily, here in the Washington Metropolitan area with the concentration of Federal installations, the Federal Government, itself, is perhaps the largest purchaser of milk in this market. The Government, itself, procures somewhere in excess of $2 million worth of fluid milk each year.

The Court: You mean for the Armed Forces stationed [fol. 695] here?

Mr. Saunders: For hospitals, for the Armed Forces, for inmates of institutions, and so on.

It is a reflection, we think, of Embassy's competitive vigor to note that in the seven-month period prior to its acquisition by the Defendant, Embassy sold approximately 48 per cent of all fluid milk required by Federal installations in the Washington Metropolitan area. Embassy was the fourth largest dealer but it sold more than all the other dealers put together, except for one or two per cent.

Generally speaking, as I have indicated, Government installations are volume purchasers and, as is customary, the Government seeks to buy as inexpensively as possible. We think it is further indicative of Embassy's competitive vigor that in the periodical sealed bidding which takes place for Government milk contracts during the period I have referred to, a year and a half prior to the acquisition, Embassy obtained practically half of all of the Government contract business in this Washington Metropolitan area. Embassy's success in Government sales and, perhaps, in its regular civilian sales as well, was attributable to its independence of action in obtaining its supply of milk. Virtually all of the computing dealers in the Washington market were purchasing their milk from the Defendant.

[fol. 696] Defendant's prices for milk for resale as fluid milk were largely non-competitive prices, disdainful of price levels in surrounding markets—which are considerably lower and were at that time considerably lower than the price charged by the Defendant here in Washington. Indeed, as the evidence will show, the Defendant was

forced in 1953 to adopt some competitive pricing but they only did so 'way out in the country. In certain areas where the Defendant did not enjoy the 85 per cent control that it had here in Washington, it reduced the prices in order to retain or to make sales. It did so, for example, by reducing the price from $6.60 per hundredweight—which is the price here in Washington—

The Court: When you say 85 per cent control, you really mean 85 per cent of the volume of Government sales?

Mr. Saunders: I am referring now to over-all sales; 85 per cent of all sales of milk to dealers.

The Court: I see.

Mr. Saunders: The Defendant sold 85 per cent of all milk sold to dealers.

The Court: I see.

Mr. Saunders: When we look at sales by the dealers to the Government as I indicated, Embassy had a 48 per cent share of those sales.

[fol. 697] As I was indicating, whereas it had a price, for example, of $6.60 per hundredweight for milk sold to dealers, for milk sold for resale in Washington, it was selling milk to dealers for resale on the Eastern Shore of Maryland for less than $5.00.

Embassy was an advocate of more uniform sanitary—

The Court: Let me see if I follow you. You say that the Defendant was selling milk on the Eastern Shore at much less than it was selling—

Mr. Saunders: Perhaps I should make it clear, your Honor. It is a little complicated but in essence—well, it is not quite accurate. The Defendant would sell, to—let us take a dairy here in Washington, for example, Chestnut Farms. The defendant would deliver to Chestnut Farms platform milk at a price of $6.60 per hundredweight, if that milk were to be distributed within the Washington Metropolitan area.

It would deliver milk of the same grade and quality, in fact, it was commingled with the milk which I have referred to at the $6.60 price. But when Chestnut Farms proved to the Defendant's satisfaction that it had resold

that milk on the Eastern Shore, Chestnut Farms was entitled to buy it for less than $5.00.

We think it is indicative of the control the Defendant [fol. 698] has in this market, that it can get a much higher price for milk resold here than for milk which dealers resell well beyond the Washington Metropolitan area.

The Court: Do I infer from your statement on this point that it is the Government's contention that ultimate consumers in Washington—when I say "ultimate consumers" I mean the housewife who buys bottle milk—do you mean that the ultimate consumer in Washington was charged more for that same milk than the ultimate consumer on the Eastern Shore of Maryland? Is that the Government's position?

Mr. Saunders: Well, I hesitate to answer. I think it is, your Honor, but my comparison was based upon milk at the producer price level. I might say this, and I think this may answer your Honor's question. The reason that the Association sold the milk to the dealer cheaper was that the dealer said, "I can't resell your milk on the Eastern Shore unless you give me a lower price because I have got competition from other sources there and I won't be able to make any sales if I have to pay the high price in Washington."

The Court: Could it be, also, that he would have transportation costs to the Eastern Shore and he could not meet local competition unless he had some way—

Mr. Saunders: That was not the factor, your Honor. It may have to be taken into account, but it was not the [fol. 699] controlling factor.

The Court: I see.

Mr. Saunders: Embassy was an advocate of more uniform sanitary regulations respecting the handling of milk. It sought to have the widely-used U.S. Public Health regulations, or something similar to those, your Honor, adopted here in the District of Columbia.

The Court: You know, I have been through that in another litigation. My understanding is that the District of Columbia standards for milk are much higher than the U.S. Public Health Service and, at one time, some milk

dealers urged the District authorities to relax their standards and adopt the Public Health Standards.

Mr. Saunders: And Embassy was one of them, your Honor.

The Court: My understanding is the District of Columbia has the highest milk standards of any city in the United States with the possible exception of San Francisco.

Mr. Saunders: Are you asking me for a response on that, your Honor?

The Court: Yes.

Mr. Saunders: I think the Washington milk supply as a whole, the District-inspected milk, is high quality milk, but there are many, your Honor, who would say [fol. 700] that the requirements are far in excess of what they need to be to insure a sanitary supply.

The Court: Oh, they may be too high but they are higher than the Public Health Service requirements.

Mr. Saunders: It may well be, your Honor.

The Court: And, of course, most families that use milk would rather have the highest possible standards exacted.

Mr. Saunders: I don't know about that, your Honor. I think families will take into account that they are getting a safe quality milk but they would not want to pay 5 cents more for milk or go without it simply because the standard is unusually high. In other words—and I think I can pass from this point—so far as I am aware there have been no outbreaks of disease in cities where there are the equivalents of Public Health Standards in effect.

In any event, as your Honor has noted, there was some agitation to change the District milk law. Embassy was one of the agitators for the change. It openly espoused changes in the local law and the regulations governing the sale of milk. These efforts of Embassy to obtain changes in the milk law regulations rankled the Association. No doubt the Defendant was particularly rankled because of the degree of success which Embassy achieved. [fol. 701] Indeed, as will be shown by the evidence, it was immediately following a decision by our local Court of Appeals favorable to Embassy, when Embassy challenged the District of Columbia's interpretation of the 1925 Milk

Act, that the negotiations which led to the purchase of Embassy commenced.

There was another aspect of Embassy's operation that is particularly significant in this case. Embassy was a continuing outlet for milk by producers who were not members of Defendant's organization. As will be shown, these producers who tended, on the average, to be larger producers than members of the Association, sold milk to Embassy at about the prevailing market prices. A market price in this market is largely set by the firm which has the 85 per cent control, I might add.

Thus, such farmers received returns equal to and in fact, better in many instances than did Defendant's members since Defendant's members were and are charged or assessed charges for the running of their organization, as Mr. Hooper testified earlier in this case.

On Embassy's part there was a decided advantage in dealing with the independent producers. These producers did not employ a classification system of pricing their milk, but sold instead on a flat-price basis.

[fol. 702] Unless a dealer uses a substantial proportion of milk in other than fluid uses, flat-price buying, particularly where the classified pricing system is also in use in a market, is decidedly advantageous. The willingness of the competing farmers to sell their milk on a pricing basis, which gave Embassy a competitive advantage over dealers who bought from the Defendant, was an important factor in the Association's decision to acquire Embassy's assets and thus to eliminate Embassy as an outlet for those who would not do business on terms comparable to the defendant.

Embassy presented another problem to the Association. The Federal Government has brushed aside the peculiarities and technicalities of local health regulations when it purchases milk throughout the country. If fluid milk meets certain uniform requirements which the Federal procurement agencies set, even though it may not meet the particular requirements of local ordinances, Federal purchasing officers are free to procure such milk.

This results in a wider movement of milk about the country.

While distance and resulting transportation costs naturally affect prices, it sometimes happens, particularly in the so-called flush spring seasons, that milk may be trans-
[fol. 703] ported considerable distances from areas of production and still remain competitive from a price standpoint. Embassy offered an outlet in the W..shington Metropolitan area for such milk.

From this background it may be seen—

The Court: You say "such milk." What do you refer to by "such milk"?

Mr. Saunders: For example, milk which would come from Pennsylvania or Illinois. I do not know that it particularly happened here but the Midwest of course has large production areas which are seeking to obtain outlets.

From this background, it may be seen that Embassy and the Association did not see eye to eye on a considerable number of matters in the present acquisition period.

The Court: Well, since you have finished the statement of the background, apparently you are going to pass onto another topic. Then this might be a convenient time for us to suspend for our mid-morning recess.

(A brief recess was taken.)

[fol. 704] Mr. Saunders: When we took our morning recess, Your Honor, I had made a comment from the background that I had developed here that it is obvious that the Association and Embassy did not see eye to eye on a number of matters.

The evidence will show that it was with the specific intent of eliminating Embassy, Embassy's competition with the defendant's customers, Embassy's competing sources of supply, that the defendant entered into the instant agreement of acquisition. In short, Embassy was in the defendant's way.

In a summary prepared to explain the proposed acquisition which the defendant got up, it stated exactly how Embassy was in the way. According to the defendant, Embassy had repeatedly sought to procure changes in the District law and regulations. Embassy had procured milk from other than local sources. Embassy had taken sales away from dealers who bought milk from the defendant,

and, according to defendant's calculation, Embassy's competitive activity in this market meant that the defendant enjoyed a two million dollars less sales per year than it would otherwise have obtained.

The one certain way to overcome the obstacle which defendant considered Embassy to present was for the defendant to obtain an agreement by Embassy, for a hand- [fol. 705] some consideration to be sure, to remove itself from the market, and to turn its business over to the defendant.

The Court: Before you proceed, may I ask you as to your contention on this point so far as the Clayton Act is concerned. Does the element of intent enter into it?

Mr. Saunders: The element of intent need not be proven, Your Honor. The effect is what is important.

The Court: That is what I thought. Of course, intent may be an element in the cause of action under the Sherman Act but it does not seem to me to be under the Clayton Act and that was the purpose of my question.

Mr. Saunders: I think the Government views it this way, Your Honor. Under the Sherman Act, if we can show specific intent to accomplish an unreasonable restraint we need not show effect.

Under the Clayton Act effect is what is important. Intent may well be relevant in forecasting the probable effect—

The Court: Yes, but it is not a necessary element.

Mr. Saunders: It is not, Your Honor. We agree with you.

Defendant obtained the sort of agreement from Embassy which it felt it needed to overcome the obstacles. In essence, that is what the Sherman Act part of this case is [fol. 706] all about.

This is a case where the unlawfulness under the Sherman Act of the acquisition agreement can be demonstrated by proof of either of the following: Intent to unreasonably restrain trade or the unreasonable restraint, itself.

The Government will show, by evidence to be offered, that the intent with which this acquisition was undertaken, in and of itself renders the agreement unlawful. Yet, aside from the evidence of unlawful intent, the evidence as to

unreasonable effects, standing alone, would equally render the acquisition unlawful.

In the Columbia Steel case, 334 U.S., page 525, the Supreme Court noted, quoting:

"Even though no unreasonable restraint may be achieved nevertheless, a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman Act."

The evidence will show that in the year immediately preceding the acquisition, defendant openly stated its intention of keeping Embassy from opening a distribution station in nearby Virginia, allegedly because Embassy did not meet the same standards as members of the defendant's Association, and because Embassy obtained milk from the Eastern Shore.

[fol. 707] The Association, in effect, would set itself up as the determining agent as to what is proper conduct and proper standards.

The intent of the defendant to eliminate competition of other farmers supplying milk to the Washington market is reflected in numerous statements which will be offered in evidence, made by defendant's officers prior to the consummation of the acquisition agreement, to the effect that the owner of Embassy, Mr. Ward, had agreed he would divert the farmers supplying Embassy to the Baltimore market.

Now, to put this in proper focus, Your Honor, I might point out—this is something in response to what Your Honor asked about—the Association, of course, would take these farmers as members rather than have them remain independent, but it was far preferable from the Association's standpoint that they remove themselves entirely from the market.

Indeed, as a part of the acquisition agreement, Mr. Ward undertook to divert the producers from Embassy to Baltimore, or to use his best efforts to cause them to join the defendant's organization.

Since it was the defendant's intention to use its own milk exclusively in the Embassy plant, it is clear that the acquisition agreement contemplated foreclosure of the only sub-

[fol. 708] stantial outlet for milk produced or supplied by others than the defendant.

Defendant indicated in this connection, shortly after entering into the acquisition agreement, but prior to its consummation, that it anticipated that all except six of the farmers who had supplied Embassy would be diverted by Embassy's owners to the Baltimore market.

The evidence will show that there was no available outlet in the Washington market other than Embassy for any substantial number of independent farmers. This would follow from the fact that the Association was supplying 85 per cent of the milk. The only other outlets which utilized non-association milk did not have the capacity or the demand on relatively short notice to engage to take the milk of the farmers who had been supplying Embassy.

The Court: May I interrupt you with this inquiry?

Did the Association purchase milk from non-members or did it confine itself only to buy milk from members?

Mr. Saunders: It depends upon the period, Your Honor, but most of its sales came from the production of its members.

The Court: Do you have any evidence on this point? If a non-member did not wish to join but was desirous of selling to the Association, would the Association buy from him?

[fol. 709] Mr. Saunders: It rarely happened, Your Honor. The Association did, in periods of shortage, obtain milk from others, from the very sort of people Embassy obtained milk from.

The Court: But only in periods of shortness?

Mr. Saunders: Periods of shortness, yes. That was usually the case, Your Honor.

As the Court can appreciate, a farmer cannot turn off a cow. When a cow is producing milk it produces it day by day and any shift in an outlet immediately effects what the farmer can do and must do in order to market his milk.

Therefore, to the extent that farmers were required to join the defendant's organization in order to market their milk in this area, or to leave the market, the acquisition had an adverse horizontal, as well as vertical, effect.

In effect, it was a forced joining of the Association for those who chose to remain in the Washington market.

The Court: Sort of a closed shop.

Mr. Saunders: No, Your Honor. The farmers were independent agents.

The Court: Well, I mean, figuratively speaking.

Mr. Saunders: Well, I suppose that may be so, yes, Your Honor.

[fol. 710] The foreclosure of competitors as independent suppliers of milk to the Washington market, which the evidence will show was the purpose for which the acquisition agreement was made by the defendant, and the foreclosure of competition, which the acquisition achieved, cannot be justified by the defendant on the ground that it was reasonable to integrate in order to expand a market for its members' milk.

By the agreement, which the defendant made with Embassy, competitors were foreclosed from the market, and as the Supreme Court said in the International Salt case, 332 U. S., page 396:

"It is unreasonable per se to foreclose competitors from any substantial market."

Further indicative of the unlawful purpose of the defendant in entering into the acquisition agreement is the price which it paid Embassy for the Embassy assets. Embassy was a corporation and sold its assets, its business, its plant, and its routes. Embassy was a moderately successful business at best. Its profits were not immense. Its annual return was approximately four to five per cent. Yet, defendant indicated in pre-acquisition discussions—not with Embassy but with others—that it would be warranted in paying a million dollars in excess of what Embassy was [fol. 711] worth in order to get control of Embassy assets.

When the acquisition was effectuated defendant entered on its books as the combined value of good will and the unamortized cost of non-competitive agreement it had purchased a total of one and a half million dollars, or approximately 40 per cent of the purchase price.

The Court: What was the purchase price?

Mr. Saunders: $3,800,000, Your Honor.

The Court: As I recall the testimony in the trial of the first cause of action, did not Embassy convey a big manufacturing plant to the defendant Association to which flowed surplus milk—surplus fluid milk was transformed into ice cream and other by-products?

Mr. Saunders: No, Your Honor, that was a subsequent acquisition by the defendant in 1955.

The Court: From whom?

Mr. Saunders: From the former owners of that plant. It had no relation to Embassy, Your Honor.

The Court: Perhaps I misunderstood the testimony of one of the witnesses that that was the former Embassy plant.

Mr. Saunders: No, Your Honor, Embassy was a distribution plant for fluid milk. That plant was a manufacturing plant for surplus milk products.

[fol. 712] The Court: I see.

Mr. Saunders: As I have said, as against the purchase price of $3,800,000, in trying to account on the books for the money which had been spent, the defendant entered one and a half million dollars as its intangible assets, good will, and a million dollars, itself, was listed as the cost of unamortized non-competitive agreement.

Indeed, since the acquisition, defendant has made moves to start to reduce the value of the good will to indicate that that was an inflated figure so far as the value of the good will itself was concerned.

This is not an acquisition, as the evidence will show, where a vertical acquisition merely deprives competing sellers of one of their customers.

The Court: Is this vertical or horizontal?

Mr. Saunders: Your Honor, the acquisition of Embassy was, itself, vertical. In so far as farmers were forced to join the Association because they had no choice in order to sell their milk, it had horizontal aspects.

The Court: I thought it was sort of a combination of the two.

Mr. Saunders: Well, we view it as such, Your Honor.

This is a case where the acquisition deprived one hundred and twenty or more persons who chose to act independently [fol. 713] of their only available customer. With the As-

sociation already furnishing 85 per cent of the milk required by dealers in the market, the acquisition agreement was aimed at a virtual extinction of competing sources of supply since there were no other available outlets for milk of such competing sources.

In addition to the principal acquisition agreement which contained covenants by Embassy not to compete other non-competitive agreements were entered into between the defendant and other persons.

The Government will show that these agreements, since they are supplementary to the basic agreement of acquisition, which was conceived with deliberate intent to exclude competition, are likewise unlawful, and must stand condemned under the Sherman Act.

The Court: Well now, do you predicate your position as to the other agreements solely on the Sherman Act or both on the Sherman and the Clayton Act?

Mr. Saunders: Well, they were allegedly ancillary to the acquisition, Your Honor. We base that upon the Sherman Act. In addition, the Government contends that regardless of the lawfulness of the principal agreement certain of the other agreements not to compete go beyond the doctrine of ancillary agreements and thus, even where the principal [fol. 714] agreement, itself, is lawful, these other agreements would still violate the Sherman Act because they, in effect, allocate territories between the covenantees and the Association.

The Court: Do you mean between Embassy and the Association?

Mr. Saunders: Embassy and certain persons—by persons, I mean natural persons—as well as corporations who had in part a relation to Embassy or who were owned by persons who had an interest in Embassy.

The Court: Perhaps your statement was a little cryptic. I do not understand how there could be an allocation of territory between the defendant and Embassy after all of the assets or all of the business of Embassy was acquired by the defendant.

Mr. Saunders: As part of the agreement Embassy undertook to furnish and it did furnish covenants made by other persons that they would not compete in the Washington metropolitan area.

The Court: Well, did it not come out at the prior hearing on the first cause of action that those persons were owners or stockholders of Embassy?

Mr. Saunders: Some of them were, Your Honor, but others were not stockholders, were not officers of Embassy, were not officers of Embassy's parent company, the Green [fol. 715] Spring Dairy in Baltimore.

We turn now to what the Court has termed the Third Count of the Government's Complaint. The allegations of violations by the defendant of Section 7 of the Clayton Act, 15 U.S. Code 18. Section 7 of the Clayton Act applies to both stock and asset acquisitions.

The Embassy acquisition by defendant was an asset acquisition. Subsequent acquisitions in 1957 of the stock of Richfield and Wakefield Dairy Corporations by defendant were acquisitions of stock.

Section 7 declares an unlawful acquisition which has the effect, in any section of the country—I should go back—in any line of commerce which may have the effect, in any section of the country, to substantially lessen competition or to tend to create a monopoly.

This Court has previously ruled in this proceeding that defendant is a corporation subject to the jurisdiction of the Federal Trade Commission. Embassy Dairy, Inc., was, in 1954, a Delaware corporation with a principal place of business in Washington, D. C. From its plant in the District of Columbia, Embassy distributed and sold fluid milk in the District of Columbia and throughout the Washington metropolitan area, which means, of course, the counties and cities of Maryland and Virginia adjacent to the District of Columbia.

[fol. 716] Embassy's total sales, and this would include all dairy products, were in excess of $7 million a year. A relatively small amount of that would be other than fluid milk. Eggs and butter and that sort of thing is an incidental part of the dairy business.

In a Section 7, Clayton Act case a violation is established if it is demonstrated that the acquisition may have the effect of substantially lessening competition or tending to create a monopoly in any line of commerce in any section of the country.

Whereas, as we have indicated in connection with the Sherman Act violations, purpose or intent to restrain trade may, in and of itself, constitute a violation,

Section 7 of the Clayton Act looks to the probable effects which the acquisition may bring about. As I said earlier, intent or purpose for which an acquisition is undertaken is highly probative as to the probable effects of such acquisition.

The amended section of Section 7 of the Clayton Act was passed, as the Senate Report on the Bill observed, in order to "cover more than is prohibited by the Sherman Act."

The report further noted that the purpose of the Bill was to "make this legislation extend to acquisitions which are not prohibited by the Sherman Act. The test illegality [fol. 717] under Section 7 is one of reasonable probability."

In the DuPont case, which Your Honor had before him previously—

The Court: Naturally, the Court is familiar with the DuPont case.

Mr. Saunders: The Supreme Court stated that to establish a violation of Section 7 the Government must prove a likelihood that competition may be "foreclosed in a substantial share of a market."

What will the Government show the Court to establish in this proceeding a violation of Section 7 based on the acquisition of Embassy Dairy assets by the defendant? The Government will demonstrate that the Washington metropolitan area is a "section of the country" within the meaning of Section 7.

In Standard Oil vs. The United States, 337 U.S., the Supreme Court stated:

"Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effected competition."

The Court: I do not think you would have to show by evidence the Washington metropolitan area is a section of the country. I think the Court can assume that.

[fol. 718] Mr. Saunders: We are prepared to do so, Your Honor.

The Court: You know, in connection with the Walsh-Healey Act, the question came up of what constitutes local area. The Court of Appeals held that local means national—nationwide may be local. It kind of startled some of us. But certainly the Washington metropolitan area is a section.

Mr. Saunders: I think, Your Honor, that has to be related to market concepts. I think Your Honor is perfectly correct in what Your Honor says as it applies to this case. We are confident that the Washington metropolitan area is an effective area of competition from a market standpoint.

The Court: I do not think you have to prove that the Washington metropolitan area is a section.

Mr. Saunders: The Government will make an offer to prove that, Your Honor, and if it is stipulated by the defendant, we can proceed. Of course, we do have to prove it as an element of our case.

The Court: Well, I think the Court will almost take judicial notice of that.

Very well.

Mr. Saunders: I will pass over any comments on that point, and move along.

It is the Government's contention—we move along, now [fol. 719]—we move along from necessary element of section of the country to line of commerce. It is the Government's contention that the Court may well find in this case that four lines of commerce are or may be adversely affected by the acquisitions complained of.

The Court: You mean competition in four lines of commerce?

Mr. Saunders: Yes, or there may be a tendency to monopolize.

The Court: Yes.

Mr. Saunders: We believe that the Court may find that the milk industry in the metropolitan area involves a market within a market. From the standpoint of the broad market we believe the evidence will show two lines of commerce to be involved. The one line of commerce is that represented by the demand which is supplied by milk for resale as fluid milk. The requirements of dealers located in this

area, the Washington metropolitan area, to which we referred, constitutes that demand.

A second line of commerce is fluid milk—that is to say, we come to the next step, the next phase of the industry. The distribution and sale of fluid milk in the form demanded by ultimate consumers. As the term fluid milk will be used by the Government it refers to pasteurized milk in fluid [fol. 720] forms, such as homogenized, skim, buttermilk, as well as cream and cottage cheese. The latter two products, while constituting a small proportion of the total are by custom and usage in the Washington market included in the fluid categories.

Within that broad market, the Washington metropolitan area market, there is a somewhat narrower market. It is one to which Your Honor has indirectly alluded already. This is the market for District of Columbia licensed milk.

Dealers selling milk to consumers in the District of Columbia require D. C. licensed milk. The District licensing feature, thus marks with a singular characteristic, a substantial portion of all milk supplied within the broad metropolitan area market.

While all milk supplied in the market is virtually identical in grade and quality, only that which is D. C. licensed may be resold as fluid milk throughout the area. Nearby jurisdictions have accorded a reciprocity arrangement for D. C. licensed milk. It does not work the other way around, however.

The other milk, which is regularly supplied may be resold as fluid milk only in the jurisdictions for which it is accredited. As a consequence, it may well be appropriate for the Court to find that D. C. licensed milk alone is suffi- [fol. 721] ciently distinct to render it a line of commerce.

Such a finding would be logically followed by a finding that fluid milk processed from D. C. licensed milk, since the D. C. licensing feature carries all the way through, is likewise a line of commerce within the meaning of Section 7.

An acquisition by a firm enjoying 85 per cent control of sales of a relevant product, which acquisition enables such firm to increase or maintain its monopoly position must be regarded as per se a violation of Section 7.

By its acquisition of Embassy's assets and prompt displacement of independently supplied milk by association milk, the defendant increased to approximately 95 per cent its percentage of all milk supplied in the Washington metropolitan area for resale as fluid milk.

The Court: Do you mean increased it from 85 to 95 per cent?

Mr. Saunders: Approximately. There are tenths of points I am leaving off, Your Honor.

The Court: I understand.

Mr. Saunders: Approximately nine to ten per cent of competing milk was immediately foreclosed from reaching the market because suppliers of such milk could no longer look to Embassy as a customer or outlet for their supply.

With respect to District of Columbia licensed milk, the [fol. 722] impact of the Embassy acquisition was likewise substantial. Defendants supplied approximately 85 per cent of all D. C. licensed milk in the first six months of 1954, and, roughly, the same percentages on an over-all basis in the market. Following the acquisition, its percentage of sales of D. C. licensed milk increased to 94 per cent. The percentage of market sales of D. C. licensed milk enjoyed by the defendant at the time of commencement of the present proceeding was substantially in excess of its share of over-all milk sales in the Washington metropolitan area market.

For the year 1957, the last full year prior to the trial of this case, the defendant's percentage of all sales of D. C. licensed milk was approximately 90 per cent. The effect of the foreclosure of approximately 120 D.C. licensed farmers—those farmers who were supplying Embassy who were the suppliers of D. C. licensed milk from the outlet which Embassy provided until the acquisition has been and is a continuing one.

The evidence will show that since the acquisition only milk of the defendant and its members has gone into the plant of the Embassy division of the Association. As independent suppliers to the Washington market the former Embassy shippers were virtually cut off. For a considerable period of time after the acquisition, the evidence will [fol. 723] show, there were few, indeed, of the former sup-

pliers of Embassy who were able to obtain an outlet for their milk in the Washington market, independently of the Association.

Even as of December 31, 1957, more than a year after the commencement of this action, just about 40 of the approximately 120 former suppliers were supplying milk to the Washington market independent of the defendant.

In order to continue to ship milk to the Washington market a substantial number of the former Embassy shippers had no choice but to affiliate themselves with the defendant's organization.

Even as of the present time it seems clear that the probability is that Embassy will continue to be barred as an outlet for all milk save that of the defendant. The acquisition effected a considerable change in Embassy's competitive activity, although the defendant's officer, Mr. Hooper, had announced publicly at the time of acquisition that it would mean no increase in prices. Upon taking over Embassy he immediately set about increasing his prices for fluid milk to the consumers to the Government.

The Court: Is Embassy being operated as a separate unit?

Mr. Saunders: It is being operated as a division. It is not a corporation. It is a division of the defendant's organ- [fol. 724] ization, Your Honor.

The evidence will show that the defendant indicated its willingness to lose a substantial volume of business in order to effect an increase in the level of prices.

Upon deposition, within the last year, the Chief Officer of the defendant, Mr. Hooper, stated that the defendant is still working toward the goal of raising Embassy's prices. As will be shown by the evidence, Embassy's employees are under instruction by the defendant to cause no innovations in the market.

Another effect and a continuing one has been the substantial reduction in the percentage of milk supplied for Federal contracts by sources other than the Association.

Prior to the acquisition, the defendant's percentage of milk supplied dealers for resale as fluid milk to the Government installations which we have mentioned was approximately 50 to 55 per cent. The defendant's milk enjoyed

half of the ultimate sales in the Government market. I do not use the words Government market restrictively, Your Honor. We do not contend that is a separate market, Your Honor.

In the period immediately following the acquisition the defendant's percentage soared from 50 to 55 per cent to approximately 92 per cent of all milk supplied for resale to Government installations and has averaged approxi- [fol. 725] mately 80 per cent in all of the years combined since the acquisition.

The Court: Let me have those figures again. It was raised from what?

Mr. Saunders: In the year and a half, Your Honor, prior to the acquisition, the Embassy share of milk sold to dealers for resale to all Government installations in this area was approximately 50 to 55 per cent. Immediately following the acquisition, it rose to over 90 per cent, and while there has been some diminution—

The Court: I thought you were referring to the defendant's share.

Mr. Saunders: I am talking about the defendant's share, Your Honor.

The Court: I thought you used the word Embassy.

Mr. Saunders: I am sorry if I did. I may have, Your Honor.

The Court: Yes.

Mr. Saunders: Defendant's share of milk sold to all dealers, to dealers to supply Government installations. This would include—once in a while it happens, Your Honor—a dealer from Baltimore—not very often—will come in here and compete and maybe obtain a Government contract.

The Court: Let me have those figures again, please.

Mr. Saunders: The figures are: Prior to acquisition, [fol. 726] approximately 50 to 55 per cent; immediately after acquisition, 92 per cent; on the average since the acquisition, 80 per cent.

The Court: I see.

Mr. Saunders: Thus the acquisition has had and will, no doubt, continue to have the effect of substantially lessening the percentage of milk resold as fluid milk to

the Federal Government which is supplied by other than the defendant.

The Court: Well, in order to summarize this and simplify it, is it your contention, the position of the Government, that the acquisition of the Embassy Dairy assets tends to create a monopoly in the fluid milk sold in the Washington metropolitan area to the ultimate consumer?

Mr. Saunders: Well, Your Honor, our terminology doesn't agree but perhaps I can make it clear.

The Government contends that it tends to monopoly, maintain, or increase a monopoly at the supply level. The milk sold for resale as fluid milk. There has been and may well be a substantial lessening of competition at the dealer level.

The Court: You claim a monopoly is a monopoly—in other words, a concentration?

Mr. Saunders: Yes, Your Honor.

[fol. 727] The Court: A concentration of the source of supply?

Mr. Saunders: Not supply, but of sales at the supply level.

In other words, the amount of supply is really immaterial. It is the amount that is sold. We look at the demand for a particular product, Your Honor.

The Court: I know, but I want to pinpoint what the monopoly relates to. Is it a monopoly of sales to the ultimate consumer?

Mr. Saunders: To dealers, Your Honor.

The Court: To dealers.

Mr. Saunders: To dealers.

The Court: Or is it a monopoly of the source of supply?

Mr. Saunders: It is a monopoly of sales of milk to dealers for the use for fluid milk.

The Court: Now, so far as lessening competition is concerned, what competition do you claim—

Mr. Saunders: That there may be a substantial lessening of competition at the dealer level—dealer sales to consumers, including the Government.

The Court: But the defendant, itself, was not engaged in dealer sales.

[fol. 728] Mr. Saunders: It got into that by virtue of the Embassy acquisition, Your Honor.

The Court: Yes, but prior to that.

Mr. Saunders: No, your Honor. Well, it had been some years previously, Your Honor.

The Court: Of course, under the DuPont case competition does not have to be competition between the defendant and somebody else. It may be competition between two third parties which was what happened in the DuPont case.

There was no competition between DuPont and General Motors. The competition was between DuPont and other suppliers to General Motors.

Mr. Saunders: That is our case. It is the competition between defendant and the suppliers to Embassy.

The Court: Yes, I just wanted to pinpoint the contention.

Mr. Saunders: In December, 1957, the defendant acquired the stock of Richfield Dairy Corporation and Simpson Brothers, Inc., the latter trading as Wakefield Dairy. These two firms represented a combined business with offices and plants located in Washington, D. C. They distributed and sold fluid milk in the District of Columbia, and in Maryland, and in Virginia, and within the Washington metropolitan area.

[fol. 729] Upon the consummation of these acquisitions, the business of these firms was consolidated with that of defendant's Embassy division and the Wakefield plant was dismantled.

As a result of these acquisitions Embassy's share of the fluid milk business—Embassy's share of the fluid milk business in the Washington metropolitan area increased from approximately nine to fifteen per cent, making Embassy the second largest dealer in the Washington metropolitan area. Previously they had been the fourth largest. As a result of the Wakefield-Richfield acquisitions they have moved up now to second place, in terms of dealers.

The Court: You say Embassy did?

Mr. Saunders: Yes.

The Court: But Embassy is no longer in existence.

Mr. Saunders: They use the same name, Your Honor. They bought the trade-name. Maybe I should make that clear. When we talk about Embassy prior to July 26, 1954,

we mean Embassy Dairy, Inc. When we talk about Embassy since July 26th—roughly, August 1, 1954, we mean Embassy Dairy Division of the defendant.

The Court: It is all the defendant.

Mr. Saunders: Yes, it is, indeed.

The Court: Yes.

[fol. 730] Mr. Saunders: It is an integrated operation, Your Honor.

The Court: Embassy, for the purpose of this case, no longer exists; does it?

Mr. Saunders: As a dealer outlet, yes. The Association is now in two levels of the business. In the production supply level it is in the dealer level and it operates under the separate name of Embassy—

The Court: It does not make any difference what name they use. The Association is operating it; isn't it?

Mr. Saunders: Indeed it is, Your Honor.

The Court: Very well.

Mr. Saunders: The vertical integration of defendant's business accomplished by the Embassy acquisition has placed the defendant in the position of unusual competitive advantage. This results from the fact that the defendant insists upon obtaining the most exacting and detailed information concerning the operations of the firms which it supplies with milk. Under the classified pricing system which defendant employs, a dealer who obtains milk from the defendant must account specifically for the ultimate utilization for each pound of milk delivered by the defendant.

This must be done by the dealer in order to establish to the defendant's satisfaction the precise quantities of milk [fol. 731] which are resold in the so-called lower classifications.

Unless a dealer submits to a monthly audit of his books and records by the defendant, for this purpose, the dealer is charged at the highest classification price for every bit of milk which is obtained from the defendant.

Since the so-called audit procedure insisted upon by the defendant, to which I referred, requires a dealer to disclose to the defendant not only his use of the defendant's milk but also the exact quantities of milk which the dealer obtains from any other source, it is obvious that the audit

affords a means of surveillance by the defendant of its customers' purchases from competing sources.

The evidence will show that information obtained by the defendant—

The Court: What has that to do with this case?

Mr. Saunders: This is an integrated—this is a vertical acquisition. When defendant was operating only as a supplier, Your Honor, and there has been no change in this audit procedure, it went in allegedly to obtain information necessary to make final settlements with the dealers.

The Court: With the producer, isn't it?

Mr. Saunders: With the dealer. They go to the dealer's plant and the dealer opens his books and the Association [fol. 732] takes off information. They say it is necessary in order to prove so much milk was used in Class 1, the high-priced class, and in Class 2, and the like. Unless the dealer allows the Association to come in—

The Court: I understand that. I have had that in other cases involving this defendant and the Court of Appeals has approved the legality of that.

Mr. Saunders: We are not questioning that, Your Honor. But now that the defendant—

The Court: Not only the Court of Appeals but the Supreme Court in cases arising from other jurisdictions.

Mr. Saunders: That is unquestioned, Your Honor, but there is nothing to prevent another type of pricing plan being used, as well.

But the point here is this: When the defendant was a supplier that was one thing; but the defendant is now not only a supplier to the other dealers but it is a competitor. Every month the defendant goes into its competitor's books and records for the purpose of allegedly obtaining information which it needs for this purpose.

The Court: I think this is a little bit of an aside.

Mr. Saunders: No, Your Honor, I do not agree. I do not agree for this reason: There are a number of cases. [fol. 733] I think the Benrus-Hamilton case, under Section 7, which held that the fact that a director gains access to information as a result of an acquisition would raise a question as to the advantage as a result of the acquisition.

The Court: I always hold every litigant down in every case that comes before me to specific issues. I do not let any

case, if I can physically prevent it from doing so, to go off on tangents. Or things that might have a possible bearing but do not bear on the issues. What you have to show under this statute is the acquisition, and second, that it lessens competition or tends to create a monopoly. If you do that you have got a prima facie case.

Mr. Saunders: I respectfully submit, Your Honor, this may well have a bearing on the probable effect of lessening competition. May I explain?

The Court: It seems to me, if you can prove the figures and the circumstances you have outlined up to this point you have shown a lessening of competition.

Mr. Saunders: We are satisfied, Your Honor, but we want all the facts to be before you.

The Court: Time is valuable, you know. Do not misunderstand me. I am not critical. I think it is in the nature of things for a lawyer—a trial lawyer is always under a certain amount of strain, even though he does not realize it, [fol. 734] and to be on the safe side he is over-cautious and most every lawyer puts in more than he needs. That is where the Judge has to control the flood of evidence.

You may proceed.

Mr. Saunders: I will pass over, for the moment, Your Honor, this business of the confidential business information which is obtained by the defendant from its competitors as a result of this audit procedure that I mentioned.

The Court: You have covered your case; haven't you?

Mr. Saunders: Yes, sir. I am about to conclude, Your Honor.

The Court: Go ahead.

Mr. Saunders: As we proceed with the introduction of evidence in this cause, we urge the Court to be mindful of the congressional intent to prohibit all acquisitions having the prescribed statutory effects. Reasonableness or asserted business justification is not relevant to determination of the issues raised in a Section 7 proceeding.

This Court has already determined that the alleged benefits accorded agricultural cooperatives by congressional enactment do not extend to acquisitions which have the effect prescribed by Section 7.

[fol. 735] Therefore, we proceed in this trial to determine what the effects of the acquisitions complained of have been or may be.

The Government respectfully submits that the evidence to be adduced along the lines that I have outlined will support findings by this Court of violations by the defendant of Sections 1 and 3 of the Sherman Act, and Section 7 of the Clayton Act, as charged in the Amended Complaint.

Thank you, Your Honor.

The Court: Mr. Bergson.

Opening Statement on Behalf of the Defendant

Mr. Bergson: May it please the Court, I think, for the Court's convenience it might be desirable that I use the same outline as Mr. Saunders used in his presentation in his opening statement, and consequently, I will address myself first to Counts 1 and 3 or the counts relating to 1 and 3 of the Sherman Act.

Mr. Saunders, in his opening statement, said that the conspiracy charged under Sections 1 and 3 was the unlawful agreement relating to the purchase and sale of Embassy and the withdrawal of Embassy Dairy from the market.

As I listened to his opening statement I knew we were talking about the same case but I am quite sure we are not talking about the same facts.

[fol. 736] Our evidence will show, Your Honor, that in 1953 and 1954, the Association, which, as you know, is a Capper-Volstead cooperative charged with the duty of selling its members' milk was faced with a tremendous surplus of milk, and that this surplus was so large at times that some of it was even going down the sewer. That for a period of time prior to the acquisition, the Board of Directors of the Association were terribly concerned about this surplus problem and they considered all manner of approaches with which to solve the surplus problem.

We will show that in April of 1954, which, incidentally, Your Honor, I think I should point out is the date when this alleged conspiracy is stated to have begun, and I think I should point out that any evidence relative to this alleged conspiracy should be confined to 1954,—that the Association was concerned with this surplus problem and sent its

then Assistant Manager, Mr. Hooper, to see Mr. Ward, the owner of Embassy Dairy to see whether Mr. Ward would buy some Association milk. During that conversation, the sale of Embassy Dairy was, for the first time, mentioned when Mr. Ward said to Mr. Hooper, "If you are concerned about the surplus problem, why don't you buy Embassy Dairy?"

This was the first time the Association gave any thought to the acquisition of Embassy Dairy.

[fol. 737] We will agree Mr. Ward wanted to get out of the Washington milk market. We will show that so far as the District of Columbia licensed shippers, who were shipping to Mr. Ward, were concerned, that Mr. Ward, the reason for the provisions in the contract relating to the shippers going to the Baltimore market was because Mr. Ward, himself, made that a condition of the agreement. He wanted to take them with him to Baltimore because he didn't have an adequate supply of shippers for his Green Spring operation, which was serving the Baltimore area.

The Association consented to this but at all times the Association was willing to and did receive into its ranks former Embassy shippers who desired to remain on the Washington market.

Those shippers that did not wish to join the Association found other outlets in the Washington metropolitan area. They joined Capital Milk Producers Association. They became independent shippers to Thompsons Dairy, and the evidence in this case will show that not one single former Embassy producer, who wanted to come to this market, failed to find an outlet for his milk.

The Court: May I interrupt you with a question?

Isn't Thompson Dairy a member of the defendant Association?

[fol. 738] Mr. Bergson: Thompson Dairy is a customer of the defendant Association.

The Court: Not a producer?

Mr. Bergson: Thompsons Dairy is a dairy and not a producer. Unfortunately, Your Honor, there is this horrible conflict in terminology.

The Court: To use correct English, a dairy is where milk is produced—cows and milk—

Mr. Bergson: Correct, Your Honor.

The Court: And from which milk is shipped.

Mr. Bergson: Correct. True, Your Honor. But the distributors in the Washington metropolitan area are Chestnut Chevy Chase Dairy—

The Court: They are not producers?

Mr. Bergson: Not producers.

Thompsons Dairy. They are not producers. Richfield and Wakefield, when they were in,—

The Court: They are retail dealers.

Mr. Bergson: They are distributors of milk. They process and distribute milk.

The Court: Do you mean they pasteurize it?

Mr. Saunders: Pasteurize it, bottle it, and distribute it.

The Court: They are dealers both in wholesale and retail?

[fol. 739] Mr. Bergson: Yes, sir.

The Court: I thought they had their own dairy herds.

Mr. Bergson: No; no.

The Court: I have seen them driving up towards Frederick, a big Thompsons Dairy, and I thought they had a dairy herd there.

Mr. Bergson: Your Honor, these are shippers who ship to Thompsons Dairy.

The Court: I see.

Mr. Bergson: Of the former Embassy producers, and I call them producers rather than dairies, these are the people who operate the farms.

The Court: Yes.

Mr. Bergson: Producers.

The Court: Yes.

Mr. Bergson: I suppose the cows are really the producers—(Laughter)—but of the shippers—the producers who formerly shipped to Embassy Dairy, forty-odd of them, I believe, and I don't want to be held to this figure, are now shipping to Thompsons Dairy. Several of them, 15 in number, I believe, are now shipping to Capital Milk Producers Association.

[fol. 740] The Court: Does that operate in the Washington metropolitan area?

Mr. Bergson: Yes, sir, Your Honor. Solely in the Washington metropolitan area.

There is not a single former Embassy shipper with a D. C. inspected farm who has been foreclosed from selling his milk in the Washington metropolitan area by this acquisition.

The Court: Without having to join the defendant Association?

Mr. Bergson: Some of them did join the defendant Association. But some of them—they came to us or went to Thompsons. We took every one we could get.

And just in passing, because of a question that was asked, but it does not seem to me to be too important, the Association has never refused membership to any producer of milk owning a farm that meets D. C. health standard inspections, has never refused membership in the Association to such a farmer.

Now, this is the foreclosure of competition, according to Mr. Saunders, at the producer level.

The point that I originally started to make was that the taking of these producers to Baltimore was Mr. Ward's idea, and not our idea. There is no element of conspiracy [fol. 741] whatsoever in the acquisition by Embassy—by the Association of Embassy Dairy. This was a contract of sale and a contract of purchase. It was coupled with an ancillary covenant not to compete.

Mr. Saunders, in answer to your question about who the others were who signed the contract not to compete, stated that some of them were corporations owned or controlled by Mr. Ward and others were individuals.

Well, our evidence will show that every signatory of this contract, not to compete, was a corporation owned or controlled by the seller of Embassy Dairy or by the person who owned all the stock of the seller of Embassy Dairy, or was related to such seller by blood, namely, the individuals or his sons and daughters, all of whom stood to benefit by this sale of Embassy Dairy, and that there was no extension of the ordinary doctrine of ancillary restraints.

The Court: I think I had occasion to discuss the doctrine of ancillary restraints in the recent motion picture case. That question was involved.

Mr. Bergson: Yes, sir. We cited that in the brief we submitted to you on the argument the last time.

The Court: Yes.

Mr. Bergson: At the time you dismissed Count 1.

Now, Mr. Saunders has stated in his opening statement [fol. 742] that he will show the elimination of competition at the dealer level. The Association was not in the wholesale distribution of milk at the time it acquired Embassy Dairy, so when it acquired Embassy Dairy it merely substituted itself for Embassy Dairy, so that the number of competitors in the market at the retail and wholesale level remained exactly the same.

Mr. Saunders, riding his horses both ways, because he has argued that we got too much business at the producer level, and on the other hand, he states we are not getting enough business at the dealer level, our evidence will show that Embassy competition or the Association's competition in operating Embassy Dairy has been just as vigorous and just as strong and just as successful as was the competition of Embassy Dairy when it was operated by Mr. Ward.

The Court: Wasn't that contended by defendants in the DuPont case and four of the six Supreme Court Justices did not consider that a good defense.

Mr. Bergson: Your Honor, this is at the horizontal elimination of competition, horizontally, at the distributor level.

That was not involved in the DuPont case.

The Court: No. What I had in mind was this: The Supreme Court held, as I understand it, among other things, [fol. 743] in the DuPont case, it is immaterial whether competition was actually less but the question was whether there was power to lessen competition.

I think they carried the phraseology of the statute a little further than this liberal construction would be because my recollection of the facts of the DuPont case is this: DuPont supplied certain articles used in the manufacture of automobiles to General Motors; that there were other suppliers of similar competing materials. The evidence actually showed, as I read the case, that the same competition continued and was not actually lessened—some divisions of General Motors bought from DuPont and some from others, but the Supreme Court held because there was a potentiality of control and lessening of competition, even though it was not actually lessened, that that was enough to constitute a violation of the Clayton Act.

Of course, that was a four to two decision, but, after all, that is just as binding on the Court as a unanimous decision. It is not as equally binding on the writer for the Law Review, but it is equally binding on the Court, irrespective of whether the Court agrees with it or not.

Mr. Bergson: I do not propose to take issue with that, Your Honor.

In this case, the Government has charged in this case, [fol. 744] it has had effects on both levels and that we entered into a conspiracy to restrain trade at two different levels.

The Court: Are you now referring to the Sherman Act cause of action or the Clayton Act cause of action?

Mr. Bergson: I am still referring to the Sherman Act cause of action.

The Court: I think, perhaps, my query really was directed to the Clayton Act cause of action.

You may proceed.

Mr. Bergson: I think it is important, Your Honor, to make this distinction, because this is a confusing case.

The Court: I think I am going to prevent the confusion by trying the two causes of action separately. The thought develops in my mind, as Mr. Saunders was opening the case, and it is becoming more emphasized as you are proceeding.

I think that might be conducive to clarity of thinking to Court and counsel both.

Mr. Bergson: Yes.

On Sections 1 and 3 of the Sherman Act, the charge is, as I understand it, that we eliminated competition between ourselves and other producers who were supplying dairies —distributors in the market.

There is also a charge, Your Honor, that we, and it has [fol. 745] to be we, intended, to eliminate competition between Embassy Dairy and the other dairies in this market. That they—I don't know—the nature of the competition may have been lessened—that we may not have competed for this market as vigorously as Mr. Ward competed and therefore this lessens competition.

Now, I have two points here: One, the evidence will not show that. The evidence will show we have competed just as vigorously as Mr. Ward competed when he was here.

Secondly, our intent, even if we had such an intent, had nothing to do with Mr. Ward's reasons for selling this dairy, and if we had an intent to lessen competition, it has to be a combination or conspiracy to lessen competition.

Who do we combine with? Who do we conspire with to lessen competition? The only thing here is a contract of sale and purchase.

Before I pass on to the section 7 count, Your Honor, I would like to make just a few observations.

Mr. Saunders said he will prove, in answer to a question by Your Honor, that the prices to the housewife in the Washington metropolitan area are higher than they are in other areas of the country.

We do not think this has any bearing on the case but we are prepared to show the prices to the housewife in the [fol. 746] Washington metropolitan area are about average to metropolitan areas of the same size.

The Court: I was not as impressed by that as I was by your statement that the defendant was selling milk at higher prices in the Washington metropolitan area than it was selling milk on the Eastern Shore of Maryland. That is what my inquiry was directed to. Not the prices charged in cities for milk by other concerns.

Mr. Bergson: I do not think that has anything to do with this case, because the charge under 1 and 3 is that we conspired to eliminate competition in the sale of milk to Washington metropolitan area dealers for resale in the Washington metropolitan area.

The Court: Except this, Mr. Bergson. If that statement can be proved that the defendant was selling milk for resale on the Eastern Shore at a lesser price, than it was selling for resale in the Washington metropolitan area, wouldn't that show, or wouldn't that tend to show some of the potentialities of monopoly powers?

Mr. Bergson: Your Honor, let's bear this in mind: Your Honor held, when you dismissed Count 1, that we could have a monopoly and we could have a monopoly power and we could exercise a monopoly power. The question is: What does this acquisition have to do with it? What does this [fol. 747] conspiracy have to do with it? I do not think it makes any difference whatsoever as to what the prices

happen to be down there or why we sell at such a price or why we do not sell at such a price. Unless it can be tied into this particular transaction.

[fol. 748] I might say, Your Honor, however, that the prices to the housewife at the eastern shore are higher than the prices are to the housewife in Washington, and the reason that we have to sell to our dealers in order to get milk sold down there at a lower price than we do in the Washington metropolitan area is just the reason that your Honor put your finger on: transportation charges.

The housewife doesn't pay any less. But we have got to move milk. We have milk and we have got to move it. We don't want it to go into manufacturing where the price is $2.00 or $2.50. We want to move it in as high a classification as possible.

But this has nothing to do with the Embassy acquisition.

I am only going to touch briefly on—

The Court: Your opponent has taken considerable time and you may take as much time as you think you need.

Mr. Bergson: So far as Section 7 is concerned, as Mr. Saunders says, the complaint breaks down into two acquisitions, or two sets of acquisitions. One is Embassy Dairy, and the other is Richfield-Wakefield.

Addressing myself solely to Embassy Dairy at this time, because I think Richfield-Wakefield is in a peculiar situation, the law is that in looking at the effects of an acquisition you don't look to the immediate effects or the hoped-for effects. But you look for the long range effects of such an [fol. 749] acquisition. You can't take the period immediately following the acquisition and say that this will tend to substantially lessen competition or tend to create a monopoly in any way.

You have got to look to what has happened to the market since that time.

Now, our evidence will show, and I think the government's evidence will show, that over the long range our share of the raw milk supply for use in fluid sales has not substantially increased. As a matter of fact, I think it will show it is about one percent.

The Court: What was one percent?

Mr. Bergson: Of the Association sales of milk for resale in fluid purposes in the Washington metropolitan area.

As a result of the Embassy acquisition, if there is an acquisition—I don't know if there is—but from 1953-'54 and taking it through '57, the increase was approximately one percent.

The Court: Increase of what? I don't follow you.

Mr. Bergson: The milk that the Association sold to dairies for resale as fluid milk.

The Court: What about the percentage of total sold? It is a factual contention of Mr. Saunders that the percentage of milk sold by the defendant in the metropolitan [fol. 750] area rose substantially as a result of the acquisition.

Mr. Bergson: It arose substantially for one or two months, and then it dropped right back.

The Court: I see.

Mr. Bergson: And that the long range view shows no substantial increase.

So far as Embassy's competition as a distributor is concerned, we will show that there has been no lessening of competition in any line of commerce. The figures substantiate that.

Now, one of the things that has been overlooked, I think, in this discussion is our status as a Capper-Volstead corporation.

This 85 percent we had before we acquired Embassy Dairy according to Your Honor's ruling on Count I, was lawfully acquired.

The Court: There is no doubt about that.

Mr. Bergson: All right. So we are not talking about the situation where you have a 85 percent share—where an ordinary business corporation has 85 percent of the market and acquires another one or two percent.

Our 85 percent is the plateau from which the lessening of competition has to be measured in this case. We cannot start off with this seemingly horrendous percentage of the market and tie on to that and say because we add one or [fol. 751] two percent to that and got up to 90, which we didn't, we have substantially lessened competition.

Further than that, Your Honor, we intend to show that even if this did substantially lessen competition or tend

to create a monopoly, which we show it did not, this transaction had the authorization of the Secretary of Agriculture, and comes within the exempting section of Paragraph 7 of the Clayton Act, and is not subject to the jurisdiction—to Your Honor's jurisdiction under these circumstances.

The Court: Do you believe that?

Mr. Bergson: Yes, Your Honor. We argued that, if you will recall, at the last hearing, and Your Honor said that—

The Court: I understood at the last hearing that you did not contend the Secretary of Agriculture formally approved the transaction, but that some bureau encouraged it informally, or something of that nature.

Mr. Bergson: Oh, no. This was much more than an informal approval Your Honor.

We will show that the financing for this purchase was made by the Baltimore Bank for Cooperatives, which is an agency authorized or established under the Agricultural Marketing Act, and authorized to make loans for the acquisition of retail dairies by cooperatives; that this matter [fol. 752] was discussed with the Chief of the Dairy Branch, Department of Agriculture; that there were appropriate delegations by the Secretary of Agriculture in this matter; and that when the Baltimore Bank of Cooperatives, taking all of these factors into consideration, and relying on a memorandum that was prepared by the Chief of the Dairy Branch of the Farmers Cooperative Service of the Department of Agriculture, approved this loan; that we come within the exempting provisions.

Of course, the Secretary himself cannot act on every single transaction.

The Court: There is no doubt about that. But there must be formal approval either by the Secretary or somebody delegated by him.

I think that was discussed at the last trial and the view the Court took was that approval such as you indicated was not the approval contemplated by the Act.

We are about to take our luncheon recess. Before we do so, in order that counsel might be thinking of this during the lunch recess, I will make two observations:

One is that I think it would be useful to try the third cause of action, that is, the Clayton Act cause of action,

first; and then try the second cause of action, namely, the one under the Sherman Act, as it relates to the Embassy transaction.

As I envision the situation, all of the evidence applicable [fol. 753] to the third cause of action would be equally applicable to the second cause of action, but there might be some additional evidence that might apply to the second cause of action that would not apply to the third cause of action.

For that reason I think it would be useful, not only in the interest of expedition, but also in the interest of clarity, which is much more important, to try the two causes of action separately and try the third cause of action first.

Then in presenting the evidence, Mr. Saunders, I would like, it would be very helpful to the Court, if before starting to put in your evidence, you called the Court's attention to all the matters contained in the answers, responses to requests for admissions, and also put in evidence such answers to interrogatories as you desire to be considered, making them a part of the record, so that the Court would have before it all the admitted facts, before you start putting in evidence, and it may be there will not be so very much evidence needed for a prima facie case. You may need additional evidence in rebuttal. I want you gentlemen to think about it during the luncheon recess. That is why I interrupted you, Mr. Bergson, if you will pardon me, in order to make this statement before the recess. We will take our luncheon recess at this time.

(Thereupon, at 12:30 PM., the luncheon recess was had.)

[fol. 754] Afternoon Session

(The trial was resumed at 2 p.m. pursuant to recess.)

Deputy Clerk: United States vs. Maryland-Virginia Milk Producers.

The Court: You may proceed.

Mr. Bergson: Your Honor, when we adjourned for lunch, I had just about finished stating our position on

the Embassy acquisition. I will now direct just a few remarks to the Richfield-Wakefield acquisition.

Richfield and Wakefield were two separate dairies. Our evidence will show that the Richfield Dairy ceased to operate as a dairy in October of 1955, two years before we acquired the stock of Richfield Dairy.

Our evidence will also show that at the time we acquired the stock of Richfield Dairy, which was not an operating dairy but which was the holding company of the stock of Wakefield Dairy, that both dairies were in dire financial condition, that they were unable to meet their obligations as they came due, that they were indebted to the Association for milk furnished in amounts in excess of $500,000, that they did not have cash on hand to operate the business more than a day or so, and that under these circumstances, your Honor, this case does not fall within [fol. 755] Section 7 of the Clayton Act, because of the failing-corporation doctrine where the Congress and the Courts have recognized that the acquisition of a failing corporation does not substantially lessen competition or tend to create a monopoly.

The Court: Congress has not recognized it but Court decisions have.

Mr. Bergson: The Congress specifically recognized it, your Honor, in the Committee reports on the Amended Section 7 of the Clayton Act in 1950 where they quoted extensively from the International Shoe Case.

The Court: Yes, but there is nothing in the statute.

Mr. Bergson: Nothing in the statute.

The Court: I meant, it was not recognized in that sense.

Mr. Bergson: But the legislative history is abundantly clear and the Department of Justice has recognized that legislative history.

The Court: Well, the decisions have recognized the doctrine that this Section does not apply to the acquisition of the stock or the assets of a failing corporation. Whether it is failing or not is a question of fact.

[fol. 756] Mr. Bergson: Right. We claim, as a matter of fact, that it was failing.

Further than that, we will show that the owners of Richfield and Wakefield Dairies tried to sell the dairy to

numerous other, what they thought were, prospective purchasers who would have no part of the acquisition of the dairy.

And, the Association's acquisition of these dairies was the only alternative to bankruptcy so far as the dairies were concerned.

Under this failing-corporation doctrine, your Honor, it is our position that no evidence is admissible or relevant on the share of the market, the tendency to lessen competition, or otherwise, because this is a segment that is carved out of Section 7.

The Court: You did not plead that as a defense, did you?

Mr. Bergson: Yes.

The Court: You pleaded that as a separate defense?

Mr. Bergson: Yes, your Honor.

The Court: Very well.

Of course, the affirmative is on the Defendant on that [fol. 757] issue.

Mr. Bergson: That is correct, your Honor, but the actual contract of sale recites these financial conditions—this financial condition.

The Court: Their recitals are not proof of the facts.

Mr. Bergson: I think that I should only add, not because it is of very great importance, but Mr. Saunders said that as a result of our acquisition of Embassy Dairy, we rose from No. 4 in the market to the No. 2 dairy in the market. I think the evidence will show that we remained No. 4 after the acquisition.

That concludes the defendant's opening statement, your Honor.

The Court: To summarize what you have said, so far as the Embassy Dairy transaction is concerned, is it your defense that there was no lessening of competition and no tendency to create a monopoly? Is that it?

Mr. Bergson: That is right, your Honor.

The Court: So far as Richfield Dairy is concerned, is it your defense that the transaction involved the acquisition of the stock of a failing corporation?

Mr. Bergson: That is right, your Honor.

The Court: Was there a third one?

[fol. 758] Mr. Bergson: There was Richfield and Wakefield who were acquired at the same time.

The Court: And that defense applies to both, does it?

Mr. Bergson: That defense applies to both because Richfield Dairy, which was not even operating as a dairy at that time so it was not offering any competition at all, owned the stock of the Wakefield Dairy. So it is really one transaction.

The Court: I see. Thank you.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Saunders, before we proceed, what is the position of the Government as to the defense in regard to the Richfield and Wakefield Dairy transactions?

Mr. Saunders: The position of the Government is simply this, your Honor, that, if Defendant—and from what Mr. Bergson says it is clear that he intends to go into that defense—the Government must then open up a whole new area to show that the failing company was brought about in measure, considerable measure, by the activity of the defendant.

The Court: Well, do you admit that it was a failing company?

Mr. Saunders: We admit that as of the date of the acquisition the two companies were indebted to the Defen-
[fol. 759] dant. I don't know the exact amount.

The Court: Failing condition—there is a big difference between being in a failing condition and being indebted.

Mr. Saunders: I suppose it is a fair statement that they were failing.

The Court: But it is your contention that it was the activities of the Defendant that brought about the unpleasant plight of Richfield and Wakefield Dairies?

Mr. Saunders: In considerable measure, your Honor. Of course, it is hard to distinguish as to what extent they did so.

The Court: I just wanted to get the position of the Government.

Then we will proceed. I think we should try first the third cause of action, that is, the one relating to Section 7 of the Clayton Act.

Mr. Bergson: May I interrupt just a moment?

The Court: Yes, indeed.

Mr. Bergson: On this note that Mr. Saunders has just interjected into the failing-corporation doctrine, namely, to a certain extent we may have been—the Association may have been a contributory factor to the failing condition of the dairies, it is our position that no evidence [fol. 760] on that point is admissible and that I have—

The Court: Why?

Mr. Bergson: Because the cases have held—and the activities of the defendant, for example—it makes no difference according to the Courts whether the acquiring company contributed to the plight of the acquired company under the failing-corporation doctrine under Section 7 of the Clayton Act. Now, it may be some other type of violation, namely, a conspiracy to eliminate a competitor or an attempt to monopolize or something like that. But it cannot come within Section 7 of the Clayton Act. I have here a memorandum that I would like to submit to the Court.

The Court: Yes, I would like to have that. I just had this in mind: Let us take a supposititious case: Suppose that the Defendant—I am not taking this Defendant, I am taking a supposititious defendant in an antitrust suit—suppose it be shown that a defendant in an antitrust suit has purposely so acted as to bring a prosperous competitor into a failing or insolvent condition, and having brought it to its knees so to speak, then goes and acquires either the stock or the assets of this competitor. I am wondering whether the failing-corporation doctrine would [fol. 761] apply in such an instance.

Mr. Bergson: It is our position that it does not. I think the Department of Justice, itself, has recognized that because they recently brought in a case based on those very circumstances and charged violations of Sections 1 and 2 of the Sherman Act and not violation of Section 7 of the Clayton Act.

We do not condone such practice, your Honor.

The Court: I understand. I am asking your views on a supposititious case because I do not know what the fact was here.

Mr. Bergson: Under our view of the law, your Honor, that once you have a failing corporation, it can be acquired by competitors even though the competitor was responsible for its plight, without violating Section 7.

Now, we do not say that that might not be another violation of the law.

The Court: Well, I get your point. I am not quite certain that I agree with that but I get your point.

Mr. Bergson: I might also say that this is a question of law; as a matter of fact, your Honor, we will show, if that becomes necessary and your Honor decides that testimony on this point is admissible, we will show that if it had not been for the Association, Richfield and Wake-
[fol. 762] field would have gone out of business long before they did and that it was only because of the Association that they were able to remain in business as long as they did.

The Court: Well, I think we should proceed then with the trial of the third cause of action, namely, the cause of action under Section 7 of the Clayton Act.

Mr. Saunders: May I proceed?

The Court: You may proceed, Mr. Saunders.

Mr. Saunders: For your Honor's convenience, the order may be changed a bit now, your Honor. We have prepared three volumes in which are bound the Government's exhibits so the Court may have for its own use these copies.

The Court: I think that will be very helpful indeed, Mr. Saunders, and I appreciate your doing this.

Mr. Bergson: Do we have copies of all those exhibits as bound, Mr. Saunders?

Mr. Saunders: So far as I know.

Mr. Bergson: You showed me three or four this morning which we did not have.

Mr. Saunders: Those are the only exceptions so far as I am aware.

The Court: Before we proceed, there was another [fol. 763] matter I did want to inquire about of counsel.

Mr. Bergson, it is the Court's recollection at the end of the prior trial on the first cause of action, you requested that the Court render a separate judgment and the Court said it would be willing to do so. But it assumed that counsel would prepare the judgment.

Mr. Bergson: I have the order here, your Honor, and I was going to present it at a convenient time.

The Court: This might be as convenient a time as any, before we start the third cause of action. Have you shown a copy to the other side?

Mr. Bergson: Your Honor, I showed a copy to Mr. Saunders and he objected to it as to form. We made a change. He then told me he was going to object to the entry anyway. So, we reverted to the form that we had originally prepared.

The Court: Well, suppose you give Mr. Saunders a copy and hand up the original, if you please. (Brief pause.)

Now, do you have any objection, Mr. Saunders?

Mr. Saunders: First, as to form, your Honor. The order, we believe, incorrectly states your Honor's findings.

[fol. 764] We do not consider, and I think your Honor will agree, that no affirmative defense under Section 2 of the Capper-Volstead Act, namely, in effect, the asserted primary jurisdiction of the Secretary of Agriculture, was sustained.

The Court: Yes, that is correct. Which defense is that?

Mr. Saunders: In parentheses after the word, "third" in the order, itself, your Honor, the words "Capper-Volstead Act, Sections 1 and 2," appear.

The Court: What about that, Mr. Bergson?

Mr. Bergson: The primary-jurisdiction defense, your Honor, was the fourth affirmative defense. We recite that it came on to be heard on the third, fourth, fifth, and sixth affirmative defenses. The sixth affirmative defense was the DC Code. We withdrew that one.

You granted it only under the Capper-Volstead Act and the Clayton Act, which is the third and fifth.

The Court: That seems to be correct.

Mr. Saunders: Your Honor indicated that they were both one and the same thing in connection with the argument and that is why we are concerned that the inclusion of Section 2 might leave in doubt that question.

[fol. 765] The Court: All you want is to strike out Section 2 in parentheses, is that all?

Mr. Saunders: It is really immaterial. Just say Capper-Volstead. But one might be preferable.

The Court: Suppose I strike out Section 2. I think that might be more accurate.

Anything else?

Mr. Saunders: Yes, your Honor.

The Government pleaded two causes of action in paragraphs 21, 22 and 23, namely, monopolization and attempts to monopolize.

The Court: Well, I think that is all one cause of action.

Mr. Saunders: We would appreciate having it made plural.

Mr. Bergson: We have no objection to changing it to "causes of action."

The Court: I think that is all right.

Mr. Saunders: Leaving the question of form. Your Honor, in view of the fact that it seems clear that all issues in this case will be disposed of quite soon, the Government felt that there was no reason that the order had to be entered at this time, that it could await the disposition of the entire case.

[fol. 766] The Court: Is there any particular objection?

Mr. Saunders: Other than that, no.

The Court: I do not think the Government would be prejudiced by having a separate judgment, would it?

Mr. Saunders: Not particularly.

The Court: I think I am going to sign this. Now, you may proceed, Mr. Saunders.

In view of Mr. Bergson's opening statement, I want to pinpoint again, if I might use that term, what competition it is that you claim, either was lessened or there was a tendency to lessen—just in a sentence or two—as a result of this transaction?

Mr. Saunders: Two levels of the industry, your Honor. The monopolization of sales of milk to satisfy the demand represented by dealers in the Washington metropolitan area.

The Court: You mean monopolization of sales to dealers?

Mr. Saunders: That is right, your Honor.

Secondly, there would be a tendency to monopoly and a substantial lessening at that level.

With respect to the dealer sales to consumers, that the effect was and may be to substantially lessen competition.

[fol. 767] The Court: Among dealers?

Mr. Saunders: At the dealer level, yes, your Honor.

The Court: But competition among whom? Among dealers?

Mr. Saunders: Yes, your Honor, among dealers.

The Court: I see. I think you have got a head-on issue there because the defense claims that the transaction substituted one dealer for another, as I understand it; substituted the defendant for the Embassy Dairy and did not take any dealer out of the market. Is that correct?

Mr. Bergson: Yes, your Honor.

Mr. Saunders: Of course it is our position that substituted a vastly different kind of dealer, your Honor.

The Court: Yes, I understand. I just wanted to create the issues head-on.

You may proceed.

Mr. Saunders: I ask your Honor to take notice, in view of the way this entire case has proceeded—I expect it is appropriate to proceed in this manner—of your Honor's findings which were rendered on October 16 after the trial [fol. 768] of the first cause of action.

At page 306 of the transcript, your Honor found that the defendant, Maryland and Virginia Milk Producers Association—

The Court: Will you suspend for just a moment? (A brief pause)

You may proceed.

Mr. Saunders: Your Honor made the finding: "The defendant, Maryland and Virginia Milk Producers Association, Incorporated, is a Maryland corporation having its principal office in the District of Columbia. It is an agricultural cooperative association, having as members nearly two thousand milk producers, that is, persons owning or operating dairy farms at which milk is produced, most of the members being located in the States of Maryland and Virginia."

And now I am skipping a line. Now on page 307 the finding continues: "Most of the milk is sold eventually to dealers in the Washington Metropolitan area. The defendant also owns a plant at which it transforms surplus milk into various milk products, such as ice cream. These by-

products are shipped to other markets. The net worth of the defendant corporation is approximately five million dollars."

[fol. 769] The Court: The Court will note that finding and make it a part of the record of this trial.

Mr. Saunders: Also, on page 322 of the same transcript the findings by the Court as stated—

The Court: Page 322?

Mr. Saunders: October 16, page 322.

The Court: Very well. You may proceed.

Mr. Saunders: The paragraph reading as follows—the first full paragraph at the top of that page:

"The Court has no doubt that the defendant corporation is subject to the jurisdiction of the Federal Trade Commission and, therefore, within the terms of Section 7 of the Clayton Act, 15 U.S. Code 45."

The Court: Yes. Of course, that is a conclusion of law rather than a finding of fact.

Mr. Bergson: May I interject here?

The Court: Yes, indeed.

Mr. Bergson: One of these findings of fact to which Mr. Saunders alluded is pretty immaterial to the issue here.

The Court: That may be. I am not passing upon the materiality at this time.

[fol. 770] Mr. Bergson: I thought Mr. Saunders was relying on them as evidence now in this case.

The Court: After all, this is all one case and findings of fact heretofore made are as applicable to this section of the trial as they were to the first section. And I conceive of this procedure at the moment as being just, as a matter of convenience, counsel's calling the Court's attention to what is already in the record.

Mr. Saunders: There would be a surprise if different findings were made.

Mr. Bergson: I would be, too, because there is not any need for them.

Mr. Saunders: Now, your Honor, in order to get into this, we will take up initially here a number of admissions. I think this is somewhat along the line your Honor requested. There may be a few others that we think would be better presented in order but there are quite a few we

can get rid of or get right out of the way in the beginning if that is agreeable.

The Court: You proceed in your own way.

Mr. Saunders: I would like to offer at this time, your Honor, Defendant's Admissions Nos. 124, 125, 126 and 127. [fol. 771] The Court: Now, I am going to ask you to be good enough to suspend a moment because I want to read these admissions as we go along.

Mr. Saunders: Yes, your Honor. (Brief pause)

The Court: 125?

Mr. Saunders: 124 through 127.

The Court: Oh, yes. (Brief pause)

Mr. Saunders: Is the arrangement of the file understandable?

The Court: Yes. I have been through these documents over the weekend but I want to read the request alongside with the admission, to make it intelligible.

Mr. Bergson: Your Honor, you can save yourself there because we admit these and the admission just says "Admitted." The information is contained in the request.

The Court: No, you say the defendant denies the matters set forth in 124, 125 and 126 and admits the matters set forth in 127 and I just want to see what those are.

Mr. Saunders: Your Honor may be looking at—these are the requests of plaintiff to defendant.

The Court: I understand that. These thin carbons sometimes are difficult to handle. That is why it takes me so long to find the page. If counsel will just bear with me. [fol. 772] You admit 127 but 124, 125, and 126 are denied. 127 is admitted. Very well. You may proceed.

Mr. Saunders: Will you bear with counsel, if your Honor please? We have a problem.

The Court: Surely. Take whatever time you need. (Brief pause)

Mr. Saunders: Your Honor, I am concerned lest there be some confusion here. As your Honor has stated, there is a denial in connection with these requests but defendant simply restates the dollar values.

Is the Court looking at the same responses?

The Court: Yes.

Mr. Saunders: Perhaps I should read it. I am quoting:

"The Defendant admits the dollar value of the milk which it sold during each of the years referred to in these requests was as follows:—"

The Court: You need not read the rest of it. It is there. It is before the Court: They amount to about a little over $33 million a year, between $33 million and $34 million a year.

Mr. Saunders: I would like to offer at this time, your Honor, the document which has been marked as Govern-
[fol. 773] ment's Exhibit No. 4. This is a stipulation entered into between the parties concerning the shipment of milk from farms in various states to plants in the District of Columbia. It is marked as Exhibit No. 4, your Honor, and should be in Volume No. 1.

The Court: Is that in one of these binders?

Mr. Saunders: It should be in the first binder. We have a tab in every tenth document.

The Court: I see. Stipulation No. 6.

(Government's Exhibit No. 4 was marked for identification and received into evidence.)

Mr. Saunders: That is correct, your Honor.

The Court: Very well. It will be made a part of the record. If you will suspend a moment while the Court reads.

(Short pause)

Very well. You may proceed.

Mr. Bergson: Your Honor, may I be heard for a moment on that stipulation? Of course, we agree that the facts stated herein are correct but that stipulation was prepared when we had a much bigger case. Some of the figures stipulated to go back to 1950. It is our contention that no evidence on Section 7 prior to 1953 should be admissible.

[fol. 774] The Court: Yes, I think I understand that, but I think it would be useless to try to sever the stipulation.

Mr. Bergson: I quite agree. I just wanted to make my point at the first opportunity.

The Court: Very well.

Mr. Saunders: I would like at this time, your Honor, to offer the portion of the deposition of William B. Hooper, who is now the Secretary-Treasurer of the Defendant, which commences at page 1117 and reads as follows:

The Court: Just a moment. Are the depositions here? What page?

Mr. Saunders: 1117, your Honor.

The Court: I don't think it is necessary that, in a non-jury trial, counsel read the deposition. The deposition will be considered as read and will be copied into the record. Now, will you just apprise the Court where the part is that you wish to read, where it starts?

Mr. Saunders: Beginning with the last paragraph, "As you indicated this morning."

The Court: Very well. And how far does it go?

Mr. Saunders: Through the response beginning—the [fol. 775] answer "No"—

The Court: On what page?

Mr. Saunders: 1118. Just about halfway down the page. "Answer: No, I don't"—to its conclusion.

The Court: I see. Just a moment while I read this. (Pause)

The Court: Very well.

(The portion of the deposition from pages 1117 and 1118 of Mr. Hooper's deposition follows:

"Q. As you indicated this morning, the fact is, is it not, that once this milk is delivered to the dealer in a tank from Pennsylvania or from Maryland or Virginia, as the case may be, once they are delivered from the dealer, the milk from any source loses its identity?

"A. Unless there is a deliberate setup there to completely segregate it.

"Q. Do you know of any deliberate setup to segregate milk?

"A. In the same plant?

"Q. Yes, sir.

"A. No, I don't. I don't know whether there is any. I know there has been claims that it has been done, but from a practical operation I don't think it is possible."

[fol. 776] Mr. Saunders: I offer now, your Honor, the portion of Mr. Hooper's deposition commencing at page 1113.

The Court: The same volume?

Mr. Saunders: The same volume, your Honor. About halfway down the page:

"Q. Taking the Maryland milk" and continuing to the answer, "A. And from West Virginia and Pennsylvania, too." At the middle of page 1114.

The Court: It will be considered as read and will be made part of the record.

(The excerpt from pages 1113 and 1114 of Mr. Hooper's deposition follows:

"Q. Taking the Maryland milk, the Maryland produced milk, is any Maryland produced milk delivered to plants in Virginia?

"A. Not direct. Now, it gets to our Virginia plants through the process of transferring tank loads to supplement the regular assigned producers at Alexandria.

"Q. Alexandria has so-called Virginia licensed shippers, producers?

"A. That is right.

[fol. 777] "Q. But not infrequently Alexandria needs additional milk and at that point the Association transfers either from Frederick or from plants here in Washington milk to the Alexandria plant?

"A. That is right.

"Q. Now milk from Virginia is delivered to the Embassy plant, is it not?

"A. Embassy gets both Maryland and Virginia milk.

"Q. Milk from Virginia goes to the Thompson plant?

"A. Yes, they get both, too.

"Q. Both Maryland and Virginia?

"A. Yes.

"Q. Chestnut Farms gets milk from both Maryland and Virginia?

"A. And from West Virginia and Pennsylvania, too."

Mr. Saunders: I would like to request the Court to take note of paragraph 14 of Defendant's answer which admits

that there is and has been from day to day a continuous flow of milk from the farms of its members to dealers' plants in the Washington Metropolitan area prior to delivery and sale [fol. 778] to consumers, stores and other outlets in said area.

I would like at this time to offer defendant's answer to plaintiff's interrogatory, No. 21 of February 21, 1958. I might be able to read it quicker than your Honor can turn to it.

The Court: Very well.

Mr. Saunders: The interrogatory was:

"With respect to paragraph 14"—just referred to—"of defendant's answer, state whether or not milk received at the plant of defendant's Embassy Division in the period August 1954 to date has been and is promptly pasteurized and/or bottled and distributed to consumers, stores and other outlets in the Washington metropolitan area."

The answer to that interrogatory was, "Yes."

We think that the Court could take judicial notice of the fact that that is typical of the milk industry, that milk is promptly processed and distributed since it is a perishable commodity.

The Court: Any objection to the Court's taking judicial notice of that?

Mr. Bergson: No objection.

The Court: The Court will take judicial notice of that. [fol. 779] Mr. Saunders: The Court is requested to take notice of paragraph 20 of Defendant's answer in which it admits the allegations of paragraph 20 of the Amended Complaint as to certain Washington Metropolitan area dealers.

Paragraph 20 of the Amended Complaint, as read at the time of the Answer, alleged that the distribution and sale of fluid milk by Washington metropolitan area dealers constituted and does constitute trade and commerce in the District of Columbia and between the District of Columbia and states of the United States.

I would like to offer in evidence defendant's answer to plaintiff's interrogatory No. 35 of May 19th, 1958. Perhaps I can read this. It is another brief one, your Honor.

The Court: Very well.

Mr. Saunders: Interrogatory 35:

"With respect to plaintiff's admission in paragraph 20 of its answer that distribution and sale of fluid milk by certain Washington metropolitan area dealers constituted and does constitute trade and commerce in the District of Columbia between the District of Columbia and States of the United States; state (a) the name and address of [fol. 780] each dealer as to which said allegation is admitted."

And the answer to interrogatory 35 follows:

"Chestnut Farms Dairy, Thompson's Dairy, Embassy Dairy, Lucerne Dairy, Martins Dairy."

I would like to offer in evidence defendant's admissions to plaintiff's questions numbers 402—

Mr. Bergson: Excuse me. I do not think you read the complete answer there. I am sure it was an inadvertance. You left out Highs there.

Mr. Saunders: "And High's Dairy" should be included in defendant's answer to interrogatory 35.

The Court: Just a moment.

Mr. Saunders: Admissions No. 402 and 403.

Your Honor, may I request or respectfully suggest, in order that both Court and counsel are certain we are talking about the same thing, that I at least should mention something of what the admission refers to.

The Court: Yes.

Mr. Saunders: 402 relates to the location of the office of the fluid milk plant of the Alexandria Dairy.

The Court: Relates to what?

[fol. 781] Mr. Saunders: The location and office of the fluid milk plant of Alexandria dairy.

The Court: Very well.

Mr. Saunders: 403, Chestnut Farms Dairy Company; 405 Hadley Farms.

The Court: Very well.

Mr. Saunders: 407. Let me strike that one, your Honor.

408, Harvey Dairy. I have skipped one in order. 404, Golden Rule Dairy.

393, High's Dairy. There is a limited answer to that, your Honor.

The Court: Very well.

Mr. Saunders: 410, Lucerne Milk Company.

The Court: Very well.

Mr. Saunders: 411, Martins Dairy.

412, Richfield Dairy Corporation. 413, Thompson's Dairy;

414, Simpson Brothers trading as Wakefield.

Up in the 600's, your Honor, now, with respect to further admissions to be offered.

635 through 637, Alexandria Dairy Products.

The Court: Very well.

[fol. 782] Mr. Bergson: Pardon me, Mr. Saunders. This is moving so fast.

The Court: I beg your pardon?

Mr. Bergson: I have an objection to one or two of these admissions.

The Court: Which one do you object to?

Mr. Bergson: In the 635-637 category. Admission 636, your Honor, relates to sales outside the Washington metropolitan area, and admission 637 relates to sales outside the Washington metropolitan area and the complaint in this case as I understand it is confined to sales within the Washington metropolitan area.

The Court: I will overrule the objection.

Mr. Saunders: 639 through 645, pertaining to Chestnut Farms Dairy.

The Court: Very well.

Mr. Saunders: 650 and 652, Golden Rule and Harvey Dairy, respectively.

The Court: Very well.

Mr. Saunders: 653 and 654, Harvey Dairy.

The Court: Very well.

Mr. Saunders: 660 and 661, High's Dairy.

The Court: Very well.

Mr. Saunders: 655 through 657, Lucerne Milk Company.

[fol. 783] The Court: Very well.

Mr. Saunders: 658 and 659, Martins Dairy.

662, Richfield Dairy Corporation.

The Court: All these are admitted?

Mr. Saunders: Yes, your Honor.

663, Thompson's Dairy.

664, Wakefield Dairy.

The Court: Very well.

Mr. Saunders: I would like to offer at this time in evidence the portion of Mr. Hooper's deposition commencing on page 637, which commences with the question appearing halfway down the page "What is the meaning, Mr. Hooper"—halfway down the page, your Honor. "What is the meaning, Mr. Hooper?"

Mr. Bergson: Would you mind waiting until we find that?

The Court: How far does it go?

Mr. Saunders: On to 638, halfway down the page, ending with the answer, "Generally, yes."

This, your Honor, I believe I might comment, we think it supports the statement about the Washington metropolitan area. That is the purpose for which it is offered. [fol. 784] The Court: Very well.

(The portion of the deposition referred to follows:

"Q. What is the meaning, Mr. Hooper, of 'all local bids'? What does that category refer to, if it is a category?

"A. That means all bids within the normal area, which—well, let's call it the metropolitan area, for want of a better word. It is the area for which we normally have routes and normally sell.

"Q. Does it relate to Federal and District Government bids only?

"A. That is right.

"Q. Those which are let on a competitive bid?

"A. That is correct.

"Q. (By Mr. Saunders) Would you define that area a little more precisely, Mr. Hooper?

"A. I am speaking again, generally. It would be that area in which, let's say, roughly, from Gaithersburg to somewhere below Fairfax, Virginia. Let's say, in a general area such as that.

"Q. You said the area in which—I think you said 'we,' meaning the Association—

"A. Well, meaning—

"Q. —have routes and normally sell.

[fol. 785] "A. Let me correct that. I used the wrong English there, as you very well know. It is the area in which we sell to dairies. We normally run routes or have delivery routes within this particular area.

"Q. Is that what you mean when you refer to your marketing area?

"A. Generally, yes."

Mr. Saunders: I offer at this time admission No. 120.

The Court: 120?

Mr. Saunders: 120.

The Court: Very well.

Mr. Saunders: Admissions 96 through 100, your Honor. These deal with the pricing by defendant of milk.

The Court: 96 to 100, inclusive?

Mr. Saunders: Yes.

The Court: Very well.

Mr. Saunders: I would like to offer admission No. 128, which sets forth the defendant's regular prices for Class I milk.

The Court: Very well.

[fol. 786] Mr. Bergson: If your Honor please, again these admissions were prepared when we had an entirely different case. These have pricing information for 1948, 1949, 1950, 1951, 1952, as well as 1953, 1954, 1955 and 1956.

Mr. Saunders: I will withdraw the data prior to the year 1953.

The Court: Very well.

Mr. Bergson: No objection under those circumstances.

The Court: I think that disposes of the matter.

Mr. Saunders: I offer now admissions 394 through 400. This refers to the matter I mentioned this morning in the opening statement, namely, the lower prices charged for milk sold out beyond the Washington metropolitan area than are charged in the area.

The Court: I see.

Mr. Bergson: We object, your Honor, on the ground that they are irrelevant to the issues being tried at this time.

The Court: Objection overruled.

Mr. Saunders: I am certain your Honor appreciates [fol. 787] that this data has to be assessed by comparing admission No. 128 with admission No. 397, 398, 399 and 400.

Mr. Bergson: I assume the same limitation as to time applies?

Mr. Saunders: Yes.

The Court: Very well.

Mr. Saunders: May I point out, your Honor, in order to save time, in passing over this, that we look at just one or two months. Take the month of January, 1954. In admission 128 the regular price for Class I milk was $6.22 per hundredweight. In admission 397, for milk resold in Frederick, Hagerstown so-called fringe area, the price was $6.17. In the same month for milk sold on the eastern shore in Southern Maryland the price was $3—

The Court: I understood from Mr. Bergson's opening statement that defendant does not deny the price differential but it claims that it is necessary to establish it in order to meet competition and because it was necessary to absorb the transportation charges.

Mr. Bergson: That is right.

Mr. Saunders: Your Honor, that cannot be so because [fol. 788] these are prices quoted f.o.b. dealers' platforms in Washington.

The Court: The matter does not have to be argued now.

Mr. Saunders: I wanted to make it clear that these are the Washington delivered prices.

Now, your Honor, I want to raise the question about procedure. Perhaps, in view of your Honor's previous comments, your Honor may wish to dispense with this. I simply raise the question. We are prepared to offer at this time, ask the Court to take judicial notice, of the findings by the Secretary of Agriculture in the 1940's as to the Washington milk market area, and also to show your Honor by virtue of a map what that area was.

The Court: I do not understand—

Mr. Bergson: I do not think there is any dispute to what the Washington metropolitan area is.

Mr. Saunders: There may be no dispute as to what the Washington metropolitan area is, your Honor, but I have to operate under the assumption until the Defendant admits otherwise, that there may be a dispute as to whether the Washington metropolitan area is the normal milk market encompassing the District of Columbia and [fol. 789] nearby Maryland and Virginia counties.

The Court: Let me ask you this: Is the Government contending that the Washington metropolitan area and the Washington marketing area are co-terminus?

Mr. Saunders: That the Washington metropolitan area is a distinct milk market. That is our contention.

The Court: Is that admitted?

Mr. Bergson: That is admitted.

The Court: Very well. I should think that that would be sort of a natural inference from the facts.

Mr. Bergson: Mr. Saunders, when you refer to the Washington metropolitan area, you refer to government installations located in the Washington metropolitan area, as well?

Mr. Saunders: I refer to sales to government installations within that area, yes.

I offer at this time a document which has been authenticated by plaintiff and which has been marked for identification as plaintiff's exhibit No. 21.

The Court: Is that in this book?

Mr. Saunders: It is, your Honor.

Mr. Bergson: What is it?

Mr. Saunders: It is—

The Court: I suggest it would be useful if you state [fol. 790] in the record what the document is. I do not mean summarize its contents, but just identify it.

(Government's Exhibit 21 was received in evidence.)

Mr. Saunders: This is a memorandum of Mr. Hooper to directors of the Association dated June 2, 1954.

The Court: It may be admitted.

Mr. Bergson: Mr. Saunders, in proceeding here, it would help very much if you would identify these things according to the numbers which he gave us.

Mr. Saunders: Association Document No. H-252.

The Court: I think all lists of numbers should be identical, of course, so there would be no confusion.

Mr. Bergson: When you designated that to me last night, you designated No. 82.

Mr. Saunders: That was the number, of course, that was given us. We have been playing the numbers game here.

The Court: If you gentlemen will just suspend a moment, while I read this. I am just reading the portions that you underlined in red pencil.

Mr. Saunders: On pages 1, 2, 3, 4, 5, 9 and 10.

Mr. Bergson: May I submit to the Court that this designation of document numbers is going to get us [fol. 791] hopelessly confused. This is going to be introduced as Government exhibit No. 21. The last exhibit that was introduced was exhibit 4. We have been given other designations.

I think we are all going to be hopelessly confused by this designation of documents.

The Court: What is your suggestion?

Mr. Bergson: My suggestion is, Mr. Saunders number the exhibits consecutively as he puts them in.

The Court: You mean that the clerk do so.

Mr. Bergson: Submit them to the clerk for—

The Court: I think they should better be numbered consecutively. That is what we always do.

Mr. Saunders: Your Honor, as you recall, your Honor requested that we furnish the clerk a list of documents and that we number them. We made arrangements with the clerk. I must say after these were numbered—we have numbered them but now we are not necessarily putting them in the order in which they were numbered. We have to rearrange our case, as your Honor knows.

The Court: I overlooked that. I think we had better keep the numbers as given to the clerk. That will just add to the clerk's labors and possibly create confusion.

[fol. 792] Mr. Bergson: May I request, then, when Mr. Saunders gives us his daily designation of documents he gives us both the—

The Court: You gentlemen work that out together. You do not want the Court to go to that trouble.

We will take our usual mid-afternoon recess at this time.

(A brief recess was taken.)

The Court: Proceed.

Mr. Saunders: Your Honor, a question has arisen about the document marked as Plaintiff's Exhibit 4, whether or not it has been accepted in evidence, received in evidence.

The Court: Oh, yes, it is admitted.

Mr. Saunders: I want to make it clear that unless there is a problem of identification of the documents, where the documents have been authenticated between the parties, they are being offered without having any identification incorporated for purposes of the record.

The Court: It is in evidence.

Mr. Saunders: The reporter was unclear on that.

The Court: Yes.

[fol. 793] Mr. Saunders: I would like to call Mr. Robert Rawlins to the stand, please.

Thereupon Robert Rawlins was called as a witness by counsel for the Government and, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Saunders:

Q. Your full name is Robert H. Rawlins, is that correct?

A. It is.

Q. You are associated with Thompson's Dairy?

A. I am, sir.

The Court: Will Mr. Bergson and Mr. Saunders come to the Bench?

(At the Bench.)

The Court: Is the gentleman in the front row associated with you?

Mr. Saunders: With the glasses, your Honor?

The Court: There is only one seated in the front.

Mr. Saunders: He is. That is Mr. Samuel Clark who is a member of the bar.

[fol. 794] Mr. Bergson: Former assistant attorney-general from the Tax Division.

The Court: Oh, I did not recognize him.

(In open Court.)

The Court: You may proceed.

By Mr. Saunders:

Q. In what capacity are you associated with Thompson's Dairy?

A. I am a vice president, sir.

The Court: May we have the witness' name?

Mr. Saunders: Robert H. Rawlins.

The Court: Would you spell it, please?

The Witness: R-a-w-l-i-n-s.

The Court: And your first name?

The Witness: Robert.

The Court: Very well.

By Mr. Saunders:

Q. How long have you been associated with Thompson's Dairy?

A. Since September 15, 1945.

Q. Directing your attention now to the year 1954, did you obtain information in 1954 that Maryland and Virginia Milk Producers Association was going to purchase Em-

[fol. 795] bassy Dairy?

A. Yes, sir, there was a newspaper article.

The Court: Just answer yes or no.

The Witness: Yes.

By Mr. Saunders:

Q. What was the first that you heard of the proposed purchase?

A. The first that I knew of a proposed purchase was a newspaper article in, I believe, the Evening Star, around the end of May, 1954.

Q. Directing your attention then to about that time of the year, Mr. Rawlins, did a meeting take place at the offices of Thompson's Dairy attended by representatives of Maryland and Virginia Milk Producers Association at which the proposed purchase of Embassy was discussed?

A. Yes, sir.

Q. Would you state at whose request the meeting was held?

A. The request was a telephone call. It came from Mr. Derrick and Mr. Hooper of the Maryland and Virginia Milk Producers Association to Mr. Lee Thompson.

Q. Did they request a meeting at Thompson's office?

A. I am sorry, sir, they did not talk to me and I do not know whether they requested it at our offices or not.

[fol. 796] Q. Under what circumstances—

The Court: Will you fix the date or the approximate date?

Mr. Saunders: We are trying to determine whether there was a meeting, your Honor.

By Mr. Saunders:

Q. Was a meeting held at the offices of Thompson's Dairy?

A. Yes, sir.

The Court: I thought he answered that there was.

Mr. Saunders: I did not realize that.

By Mr. Saunders:

Q. Would you fix the date of the meeting as best you can, Mr. Rawlins?

A. Yes, sir, to the best of my recollection it was sometime within the first two weeks of June, 1954.

Q. And who were present at the meeting?

A. Mr. B. B. Derrick, and Mr. William Hooper, Mr. Lee Thompson, Mr. Jack Ferguson and myself.

Q. Would you please state for the Court just what transpired at that meeting?

A. Well, Mr. Hooper and Mr. Derrick came in. We said, "Hello," and asked them to have a seat and so on.

[fol. 797] Mr. Hooper did most of the talking and he told us that they were at that time, that is, the Association, was at that time negotiating for the purchase of Embassy Dairy. And they were doing it, I think he used the words they would like to attempt, or were hoping to attempt to stabilize the market by purchasing Embassy Dairy, so that they could move, among other things, some of their Class III milk into Class I spots at Embassy Dairy.

The Court: Would you repeat that last--because of what?

The Witness: So that they could move some of their Class III Milk, which is manufactured milk in this market, into Class I spots in Embassy Dairy, and that, among other things, the purchase of Embassy Dairy would allow them, he thought, to discontinue the special contract prices offered for Government contracts because Embassy Dairy would then no longer be bidding on these government contracts.

He went ahead to say that he contemplated, and hoped, that he would be able to reduce and discontinue some of the large discounts that he happened to know Embassy was giving at the time.

And, at that time Mr. Lee Thompson asked him if he [fol. 798] did not know or did not have an idea of what would happen if he discontinued or dropped drastically the discounts given by Embassy Dairy.

He said, Yes, he thought he did.

Mr. Thompson said, well, you will lose a lot of business.

Mr. Hooper replied that they were prepared to lose up to 30 or 35 per cent of their business if they dropped the discounts.

Let's see. Then one other thing that was brought up at that meeting was the matter of farmers, producers. And Mr. Hooper said that—there was quite a bit of unrest and upset because of the newspaper articles among Embassy producers and that they knew, these producers knew that Thompson Dairy bought some independent or direct-shipped milk. He then said that part of the negotiations for the sale of Embassy Dairy depended on Mr. Ward being able to take his producers to Baltimore, his Washington producers to Baltimore, and that he hoped nothing would happen to upset the negotiations.

And that is about the extent of it except for something that Mr. Derrick said. He asked Mr. Thompson three times, I remember that because it was the same question three times, if he didn't think this was a good thing, and [fol. 799] Mr. Thompson would answer him the same, and did answer him the same all three times, in that he would reserve his judgment in the matter.

Q. Is that everything that took place at the meeting so far as you can recall?

The Court: I did not get your question.

By Mr. Saunders:

Q. Is that everything that you recall having taken place at that meeting?

A. I think so, yes, sir.

Q. You testified a moment ago, Mr. Rawlins, that Thompsons was buying some independent or direct-shipped milk as you referred to it. How many independent farmers was Thompson's buying from at the time?

A. In June, 1954?

Q. Yes, sir.

A. To my best recollection, probably around six or seven.

Q. Following the Embassy acquisition were you approached by former direct shippers to Embassy in an attempt on their part to sell their milk to Thompson's?

A. Yes, I was.

Q. Was Thompson's Dairy in a position to purchase milk from those direct shippers who had formerly shipped [fol. 800] to Embassy?

A. We were not.

Q. Why was that?

A. We could not find out whether or not the contracts they had with Embassy Dairy were still in effect, whether those contracts were sold with the dairy or just what their status was.

I asked several of the farmers who approached me and they did not know the status of the contracts. And we certainly did not want to be in a position of assisting or aiding and abetting someone to jump a contract.

Q. Could Thompson's dairy have taken on fifty or sixty such shippers at that time? In 1954, Mr. Rawlins?

A. No, sir.

Q. Would you explain why Thompson's Dairy would not be able to do that?

A. Well, in the first place, we did not know whether or not they had contracts, but even if they had not had contracts, I think it would have been virtually impossible to take on fifty or sixty because, if we would have taken on fifty or sixty of those shippers, we would have had to—well, as I see it, dump some of our present shippers, the shippers we were then getting milk from.

And those shippers we had worked with and sent our [fol. 801] quality men to their farms, worked with those people for years, some of them ten, fifteen years. And we do not operate that way. We could not have dumped those people for an unknown quantity.

The second thing is we would have had to set up routes or arranged for transportation of some kind, which takes time. And the big thing is I was working by myself at that time in the field and one of the things we never or very seldom ever make an exception to is that we have a man, usually myself, go out to that farm and go over it with a fine-tooth comb to see that that farm meets all regulations, to see that the cows are healthy and so on. And that takes time.

Q. Is there anything in connection with the location of the producers that might cause a problem in setting up routes or taking on direct shippers?

A. Well, the hauling problem. Is that what you mean?

Q. My question was directed to this, Mr. Rawlins, routes must be organized where the farmers live, is that correct, where the farms are?

A. Well, either routes must be organized or if present routes are going by, we make arrangements for that truck or that route that is going by his house, if he has room, [fol. 802] to take that man on.

Q. Was it possible that—at that time, was it possible to work any substantial number of shippers into your routes?

A. No, it was not.

Mr. Saunders: No further questions.
The Court: Any cross examination?
Mr. Bergson: Yes, your Honor.

Cross examination.

By Mr. Bergson:

Q. Mr. Rawlins, you testified that you first heard of the acquisition by the Association of Embassy Dairy by reading it in the Evening Star. Do you recall whether that report stated that a contract for the sale of Embassy had already been signed?

A. No, sir, we heard of the negotiations the first time then in a report in the newspapers, not the acquisition.

Q. Would it surprise you if I told you that the contract had already been signed at the time that that newspaper report appeared?

A. Yes, it would.

Q. Now, at the meeting which you place in June of 1954, you stated that Mr. Hooper hoped to discontinue special [fol. 803] contract pricing and that Embassy Dairy would no longer bid on government contracts after the acquisition. Do you know for a fact whether or not special contract pricing has been continued since the acquisition?

Mr. Saunders: I object, your Honor. That exceeds the scope of the direct examination.
The Court: I beg your pardon?
Mr. Saunders: I say the question exceeds the scope of the direct examination.
The Court: I do not think it does, no.
Objection overruled.

By Mr. Bergson:

Q. Do you know whether special contract pricing has been discontinued?

A. No, it has not.

The Court: What has not?
The Witness: Special contract pricing has not been discontinued.

By Mr. Bergson:

Q. You stated that Embassy Dairy expected no longer to bid on government contracts.

A. No, sir, I do not believe I stated that, sir.

Q. Well, let me ask you this question. To your knowledge does Embassy Dairy bid on government contracts today?

[fol. 804] A. The present Embassy Dairy, sir?

Q. Yes.

A. Yes, it does.

The Court: The Court understood the witness' testimony to be that it was stated, that Mr. Hooper stated that it would no longer be necessary for Embassy to give a reduced price to government on government contracts.

Mr. Bergson: My notes, your Honor, have it that Embassy Dairy would no longer be bidding on government contracts. I do not know whether I dreamed that up but that was my recollection of his testimony.

By Mr. Bergson:

Q. Now, you stated—

The Court: That might be just shorthand.

Mr. Bergson: Hieroglyphics.

By Mr. Bergson:

Q. You stated that Mr. Hooper said that Embassy hoped to discontinue giving large discounts on local wholesale accounts. Do you know whether or not Embassy dairy gives large discounts on wholesale accounts?

A. For a fact, I do not.

Q. Now, you stated that Mr. Hooper said that part of [fol. 805] the negotiations with Mr. Ward depended on whether or not the Ward shippers went to Baltimore. Do you recall whether Mr. Hooper said to you that Mr. Ward wanted to take those shippers to Baltimore with him?

A. I recall nothing of the kind, sir.

Q. Now, you also stated that you could not take on the Embassy shippers primarily because you did not want to induce a breach of contract between Embassy and Ward, the shippers and Embassy Dairy, if that were the case.

A. I did not say breach of contract between shippers and Ward.

Q. You said that you did not want to induce any breach of contract?

A. Yes, sir.

Q. Between whom would that contract be?

A. I did not know.

Q. But these were shippers that were previously shipping to Ward?

A. Yes, sir.

Q. So, presumably their contracts would have been with Ward?

A. Unless the contracts had been sold.

Q. Now, is it not a fact, Mr. Rawlins, that Thompson [fol. 806] Dairy had taken on a number of the Embassy Shippers?

A. You mean at a later date?

Q. Some at the time of the transaction and some at a later date?

A. Yes, sir.

Q. How many would you say Thompson's has taken on?

A. Since August, 1954?

Q. Since August, 1954, of shippers who formerly shipped to Embassy?

A. Roughly 33 or 34.

Q. And how many shippers did you say, independent shippers, did you say that you had prior to—

A. Six or seven.

Q. So that this was a four or five hundred per cent increase in independent shippers?

The Court: Do you know how many shippers altogether Embassy had before the acquisition?

The Witness: No, sir, I do not.

Mr. Bergson: That is all. Thank you.

Redirect examination.

By Mr. Saunders:

Q. Did Thompson's Dairy purchase milk from the 30 shippers that you have mentioned, Mr. Rawlins, in 1954, [fol. 807] after the acquisition?

A. In 1954, no, sir.

Q. How many such shippers did Thompson's purchase from in 1954?

A. Roughly 3.

Q. How many did it purchase from in 1955? Your best estimate based upon your recollection, Mr. Rawlins.

A. All right, sir. My best recollection is around eighteen.

Q. You increased the number in 1956?

A. Yes, we did.

Q. The figure of 30 then is a current figure?

A. The figure of 30 is a current figure.

Q. Did anything occur during the period of time that we have been covering, which made it less feasible for the Thompson Dairy to continue to take on independent shippers, including such former shippers as applied?

A. Yes sir.

Q. Would you describe what happened, Mr. Rawlins.

Mr. Bergson: I object. I think he is bringing in new matters now.

The Court: I think that is proper redirect in view of the fact that you brought out on cross examination how [fol. 808] many former shippers he took on.

Objection overruled.

By Mr. Saunders:

Q. Do you understand the question?

A. No, sir.

The Court: You might repeat it.

By Mr. Saunders:

Q. Did anything occur during the period that we have covered, after the acquisition to the present time, which rendered it less feasible for Thompson's to continue to take on independent shippers, including former Embassy shippers if they applied?

A. Yes, sir.

Q. Would you describe what happened?

A. Well, in January of 1957 the Maryland and Virginia Milk Producers adopted a new policy of sales to dairies

who were not buying their full supply from the Maryland and Virginia Milk producers.

Q. What effect did that have on the matter of taking independent shippers on, Mr. Rawlins?

A. Well, I was not buying my full supply and this new policy created the situation where I had to take from the Maryland and Virginia Association, or buy from the Maryland and Virginia Association a certain amount of milk [fol. 809] per day on a three hundred sixty-five day basis. A base figure, so to speak.

And, of course unless my sales went up, I was stuck with that base or if I dropped below that base I had to pay a penalty. So in effect it slowed me down considerably in taking any other milk on.

Q. How many independent shippers have you taken since the date you mentioned?

A. That is since February 1, 1957. Roughly 7 or 8.

Q. On cross examination you were asked whether the Association had quoted contract prices subsequent to the acquisition. Taking the year 1954 and confining your attention to that year, after the acquisition were you advised of any reduced prices for government contract sales?

A. In 1954? I will have to decline to answer that because I do not know.

Q. You have no recollection?

A. No, sir.

Q. Your testimony was that Mr. Hooper—I want to correct a matter that I think there may be some possible misunderstanding on—that Mr. Hooper said it would no longer be necessary for the Association, rather than Embassy, to give lower prices for government contracts?

[fol. 810] A. That is right.

Mr. Bergson: May I direct just two or three questions to this new matter that was brought out on redirect, your Honor?

The Court: I do not think it is new matter but you may ask two or three questions.

Recross examination.

By Mr. Bergson:

Q. Mr. Rawlins, when this minimum policy, minimum buying policy was put into effect, were you advised that you could select your minimum?

A. Yes, sir.

Q. And were you also not advised or were you advised that this minimum could be revised at your discretion each year?

A. Not at my discretion, no, sir.

Q. But you could state your own minimum each year?

A. No, sir, that we would have a conference and arrive at a new minimum.

Q. But that a new minimum could be arrived at each year?

A. Yes, sir.

Mr. Bergson: Thank you.

The Court: Both sides are through with the witness?

[fol. 811] Mr. Bergson: Yes.

The Court: There have to be some terminal facilities. You can't have redirect and re-redirect examination.

By Mr. Saunders:

Q. Did Thompson's pick the minimum that it desired?

The Court: I think this is beyond the scope of the recross examination.

Mr. Saunders: Thank you, Mr. Rawlins.

The Court: Anything further with this witness? You may step down.

(Witness excused.)

The Court: I think we will recess this trial at this time until Wednesday morning.

(At 3:45 p.m. the trial was adjourned until Wednesday, November 12, 1958, at 10 a.m.)

[fol. 816] PROCEEDINGS

Deputy Clerk: United States vs. Maryland and Virginia Milk Producers.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: You may proceed.

Mr. Saunders: Good morning, your Honor.

At this time I would like to have marked for identification as Government Exhibit 73, a series of documents: I ask that it be marked as one exhibit.

The Court: You say you want them marked for identification—why for identification?

Mr. Saunders: This is a situation, your Honor, where we had a witness who had been called to authenticate these documents but Defendant, upon examination of the documents, has agreed that they are authentic.

The Court: Then, as a matter of expedition—you are just duplicating work by first having them marked for identification and then at some later date, you will offer them in evidence?

Mr. Saunders: There is a question whether we will offer them in evidence or rather, to save the Court's time, have some extracts prepared. But, in order to lay this foundation, I want them marked for identification at this time.

The Court: Very well.

[fol. 817] Mr. Saunders: May the Clerk mark those as Government identification No. 73.

The Court: The Court understands that you have supplied copies to the other side?

Mr. Saunders: No, your Honor.

The Court: Or you have made them available to the other side.

Mr. Saunders: They have examined them.

Mr. Bergson: Would you identify what the documents are, for the record?

Mr. Saunders: Yes.

These documents are producers' payment records, each of which pertains to one producer for one month, being from the files of Embassy Dairy, Inc., and they are num-

bered consecutively beginning in April, 1953 with No. 21250, continuing through June, 1954 through No. 23694.

(Government Exhibit No. 73 was marked for identification.)

The Court: I think, in the interest of expedition, if it is desired by either counsel to have documents marked as exhibits for identification only, that can be done with the clerk while the Court is not in session.

Mr. Saunders: I offer in evidence at this time Plaintiff's Exhibit for identification, which has been already iden-
[fol. 818] tified, No. 10.

Mr. Bergson: Did you say you offer it?

Mr. Saunders: I offer it in evidence.

Mr. Bergson: I object, your Honor. This exhibit, Government Exhibit No. 10, is a newspaper ad, dated July 5, 1950. I can see no relevance of this advertisement to the Section 7 Count in this case. Furthermore, it is completely hearsay as to anything contained therein.

The Court: Objection sustained.

Mr. Saunders: May I be heard on that, your Honor?

The Court: Well, very briefly, because it is not my practice to hear arguments on objections to evidence unless I invite it.

Mr. Saunders: With respect to the hearsay objection, your Honor, we are not offering it for proof of the contents thereof but to show that the advertisement was placed by Embassy Dairy protesting what it considered to be a monopoly situation by the Defendant. We are gauging here in this case the competitive relationship of Embassy and the Association.

The Court: I will sustain the objection.

Mr. Saunders: I offer in evidence Government Exhibit No. 12 which has been identified as a letter signed by
[fol. 819] Mr. James J. Ward, the president of Embassy Dairy, to persons who corresponded with him pursuant to an invitation contained in the advertisements which have been excluded.

Mr. Bergson: The same objection, your Honor.

The Court: Objection sustained. This is only an expression of opinion on the part of the writer and the writer

is not a defendant in this case, or associated with the defendant.

Mr. Saunders: Your Honor, may I be heard on what this is aimed at? I think it is important in this case. As I believe I explained to your Honor in the opening statement—

The Court: You will have to adjust yourself to my practice. I do not hear argument on objections to evidence unless I am in doubt.

Mr. Saunders: May I make an offer of proof?

The Court: You have made an offer of proof.

Mr. Saunders: May I state the reason for the Government's offer?

The Court: Very briefly.

Mr. Saunders: The Government will prove by the offer of such documents as these, your Honor, that the defendant was attempting to stifle, not only—

The Court: I know that. I am sustaining the objection [fol. 820] because that is neither competent nor relevant. We go on from there.

Gentlemen, I do not halt trials for the purpose of discussing objections to evidence unless I am in doubt, and then I invite argument. One of the things that prolongs litigation is arguments over petty objections to evidence.

Mr. Saunders: I would like to call Mr. Clark Diamond to the stand, please.

Thereupon CLARK DIAMOND was called as a witness by counsel for the Government and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Saunders:

Q. Would you please state your name for the Court?
A. Clark Diamond.

The Court: What is your last name?
The Witness: Diamond, your Honor.
The Court: D-i-a-m-o-n-d?
The Witness: Yes.

The Court; And your first name?
The Witness: Clark, C-l-a-r-k.

[fol. 821] By Mr. Saunders:

Q. And you are associated with Chestnut Farms Chevy Chase Dairy?
A. I am.
Q. Do you hold a position with that firm?
A. Vice President.
Q. How long have you been the vice president of Chestnut Farms?
A. About 20 years.
Q. Directing your attention now to the matter of milk which is purchased by Chestnut Farms for resale as fluid milk, Mr. Diamond, would you state whether or not the milk used by Chestnut Farms, purchased by Chestnut Farms for resale as fluid milk is not and has or has not been for the last four years back to 1953, District of Columbia licensed milk?
A. I believe it has.
Q. It has been District of Columbia licensed milk?
A. Yes.
Q. Mr. Diamond, are you generally familiar with the type of information that the defendant in this case, Maryland and Virginia Milk Producers Association obtains in monthly audits which it makes of the books and records of Chestnut Farms Dairy?

[fol. 822] Mr. Bergson: I object, your Honor.
The Court: No, this is a preliminary question that calls for a yes-or-no answer. You know that I always allow a preliminary question to be answered because the witness might answer no, and in the meantime there might have been long argument over the admissibility of the evidence.
You may answer.
The Witness: Yes.

By Mr. Saunders:

Q. Would you please state for the Court the type of information which is obtained by the Defendant in such monthly audits?

Mr. Bergson: Your Honor, I object.

The Court: Now, on that point I will hear argument of counsel. I will hear Government counsel. Why is that relevant?

Mr. Saunders: The Defendant is a competitor of Chestnut Farms, your Honor. Its Embassy Division competes with Chestnut Farms. Each month the defendant's employees go into the books and records of Chestnut Farms—

The Court: Yes, I understand all that. You have said that in your opening statement. But why is that relevant to the issues?

[fol. 823] Mr. Saunders: To show the serious competitive advantage which the Defendant now enjoys over its competitors at the retail level by virtue of its access to the books and records which it has monthly.

The Court: Do you wish to be heard, Mr. Bergson?

Mr. Bergson: Yes, your Honor.

I do not think this has any relevance to this lawsuit. It is purely a subsidiary matter. This information has been obtained by the Association for years; it has been part of its accounting practice ever since the classified use plan went into effect.

The Court: That has no bearing on the question of admissibility.

Mr. Bergson: The question is as to its relevancy.

The Court: Yes.

Mr. Bergson: This information—this gives the Association no information that it uses—

The Court: Maybe it doesn't but we will have to find out. I would not know as to how much information is given until we have the question answered. I think it has relevancy. It is not too important but it is not too remote, either, because it may show that there is a tendency to eliminate competition or, rather, to lessen competition, as [fol. 824] the phrase in the statute goes. I am going to overrule the objection and take the evidence.

Mr. Bergson: I would submit, your Honor, that, if it showed anything, it would show a tendency to increase competition.

The Court: I do not know what it would show. But I think the evidence is admissible. Now, its probative effect you may argue later.

By Mr. Saunders:

Q. Would you state, Mr. Diamond, the type of information which the defendant obtains from the books and records of Chestnut Farms Dairy on this monthly basis that we have discussed?

A. The Association obtains information pertaining to the use of our products, whether the product is sold in bottles, whole milk, or by-products—cottage cheese, buttermilk, chocolate milk.

Q. Does it obtain information as to the quantities of milk sold in the various forms that you have mentioned?

A. I think they bill us on that basis.

Q. Does the Defendant obtain information, for example, as to the exact number of quarts of homogenized milk that Chestnut Farms sell?

A. I am not certain as to whether it is homogenized [fol. 825] or not homogenized or whether it would be Vitamin D or not Vitamin D, but I think the information would serve as to what quantities would be sold, for instance, for fluid purposes as against what quantities would be sold as by-products.

Q. Does the Association obtain information concerning the areas in which Chestnut Farms resells these products?

A. It is sold on a use basis, as to how the product is acquired by us and how that product is sold.

Q. Does the Association obtain information as to where it is sold?

A. You mean by districts or whether it would be sold retail or wholesale, or to the Government?

Q. Any of those, Mr. Diamond.

A. Yes, I would think that they would obtain whether it was to be sold to the Government or whether it would be sold wholesale or retail.

Q. Do they obtain this information each and every month?

A. Yes, each and every month.

Q. Do you obtain such information concerning the Association's Embassy Division?

A. No, we would have no occasion. We could not do that. [fol. 826] Q. Would such information as the Association obtains from you respecting the Association's Embassy

Division sales be of value to Chestnut Farms in the conduct of its business?

A. Well, I would think from a competitive practice, we would love to know what our competitors do. That is one of the secrets in trade. If we can gain as much information as possible from a competitor, that is to our advantage. And, of course it is to our disadvantage if a competitor knows a lot about us that we do not know about them.

Mr. Saunders: Thank you, Mr. Diamond.

Cross examination.

By Mr. Bergson:

Q. Mr. Diamond, does this information that the Association obtains from you show the customers to whom you sold this milk?

A. I would not think so, no.

Q. Does that show the individual prices at which the milk was sold to the particular customer, except for Government contracts, perhaps?

Q. Does it even show the information on Government [fol. 827] contracts?

A. Now, gentlemen, I don't keep this information. I am in the Sales Department. I sell the product. I do not buy it but I have general knowledge that information is provided to the Association. We get a bill from them every month as to the use of what milk we buy.

Q. Isn't that information necessary for the purpose of billing the Association under the Classified-Use plan?

A. I believe it would be.

The Court: I am going to interrupt and ask counsel a question, if I may. Perhaps I am confused.

It was my understanding that the Classified-Use plan had to do or was concerned with payments made by the Defendant to its producers, to its members, for the milk that was shipped to the Association.

Mr. Bergson: No, your Honor. May I—

The Court: Yes, Indeed.

Mr. Bergson: —try to explain the Classified-Use plan? I am sure I will not be able to do it as well as—

The Court: Well, I have been through the Classified Milk Plan in another litigation and I understood that that was used to determine how much the Association should [fol. 828] pay for the milk that its members supplied.

Mr. Bergson: No, it is how much milk the purchasers from the Association shall pay to the Association for the milk supplied by the Association to the distributor. The milk is laid down at the distributor's plant.

The Court: Isn't it also used to determine how much the members get?

Mr. Bergson: When these audits are made and the bills are made, the determination is made as to what the blend price is to the distributor—I mean, to the producer. And the producer is paid for his milk on the basis of the use to which his milk was put by the distributors.

The Court: But primarily then the Classification Plan is employed to determine how much the producer should receive for his milk, isn't that so?

Mr. Bergson: But the only way you can determine it—

The Court: One thing at a time. That is right, is it not?

Mr. Bergson: I would not say primarily.

The Court: The purpose of the Classification Plan is to determine how much the farmer should receive from the [fol. 829] Association for the milk that he ships to the Association. But in order to determine that, you have to get the information from the Association's purchasers as to the purposes for which the milk was used, is that it?

Mr. Bergson: That is right. So that unless we have this audit—

The Court: I see the point now.

Mr. Bergson: —we can't determine what we are to pay the producers.

The Court: Yes.

By Mr. Bergson:

Q. Mr. Diamond, you said that you have been associated with Chestnut Farms for a period of 20 years and that you believe that this information would be of advantage to the Embassy Division of the Chestnut Farms Dairy?.

A. That is right, sir.

Q. Would it surprise you to know—

Mr. Saunders: Didn't you mean the Embassy Division of the Defendant?

Mr. Bergson: Embassy Division of the Defendant.

By Mr. Bergson:

Q. Would it surprise you to know that it is the Association's undeviating practice not to allow any member of the Embassy Division to see the audits of the customer [fol. 830] dairies.

A. I would not know about, Mr. Bergson.

Q. Mr. Diamond, in your competition with the Embassy Division of the Defendant, let us take wholesale sales, for example, do you find the competition any less intense or more intense—

Mr. Saunders: I object, your Honor.

By Mr. Bergson:

Q. —since the acquisition of Embassy Dairy by the Association.

Mr. Saunders: I object, your Honor. That is beyond the scope of the direct examination.

The Court: Objection overruled. I think this is proper cross-examination.

The Witness: As sales manager for Chestnut Farms, I find the competition most intense.

The Court: Do not let your voice go down.

The Witness: As sales manager for Chestnut Farms, I find the competition most intense along all avenues of our distribution.

By Mr. Bergson:

Q. That the competition of the present Embassy Dairy is most intense along all avenues—

A. It certainly is.

[fol. 831] The Court: In order not to have the record confused, suppose we call it Embassy Division, Embassy Dairy being the independent organization whose assets were acquired by the Defendant.

The Witness: In fact, it's making me old before my time.

By Mr. Bergson:

Q. Since the acquisition by the Association of Embassy Dairy, has Chestnut Farms lost any position in the fluid-milk market in the District of Columbia?

Mr. Saunders: I object again, your Honor. I believe this goes far beyond the scope of the direct examination.

The Court: No, I think it is proper cross examination. There has to be some leeway on cross examination. I think it is within the scope of the examination.

Mr. Bergson: Thank you, your Honor.

The Court: You may answer. Did you get the question?

The Witness: Yes, sir.

We have lost market position, as we term it. This is not a complimentary thing for me to say in the position that I occupy, but we have suffered the loss of a substantial amount of business through the loss of some [fol. 832] customers. Now, where those customers have gone, I do not know, but we have lost market position.

By Mr. Bergson:

Q. Do you attribute this loss of position to the intensity of the competition in the market at this time?

A. Yes, of course—

The Court: Just a moment.

The Witness: We lost—

The Court: Just a moment. As to Mr. Saunders' objection. Now, you are calling for opinions.

Mr. Bergson: Your Honor, this man has been in the milk business for 20 years.

The Court: This is not a matter of opinion. I think I will exclude this question. I think it is within Mr. Saunders' objection.

By Mr. Bergson:

Q. Is Chestnut Farms taking any steps to regain the lost position?

A. Naturally, sir, we try to get as many customers as we can. We lose customers and we gain customers. There is a constant turnover of them. It is my job not to let the business go down the river, so to speak.

Q. Mr. Diamond, does Chestnut Farms refuse to serve an account because it believes that the discount requested [fol. 833] is too high, wholesale account?

Mr. Saunders: Your Honor, I repeat my objection.

The Court: Yes, I think this is outside of the scope of the direct examination. Objection sustained.

By Mr. Bergson:

Q. Mr. Diamond, is Chestnut Farms an independent corporation?

A. It is not, sir.

The Court: What do you mean by "independent," there, Mr. Bergson?

Mr. Bergson: Is Chestnut Farms Dairy a corporation?

The Witness: It is a corporation.

By Mr. Bergson:

Q. Who owns the stock of Chestnut Farms Dairy?

A. Chestnut Farms is a division of the National Dairy Products Corporation.

Q. What is the National Dairy Products Corporation?

A. It is an operating company of several components in the fluid milk business.

The Court: When you say that Chestnut Farms is a division of the National Dairy Products Corporation, do you mean by that that the stock of Chestnut Farms Dairy Corporation is owned by National Dairy Corporation? Is [fol. 834] that what you mean?

The Witness: National Dairy Corporation owns the business here in Washington.

The Court: Owns the business or does it own the stock of the Chestnut Farms Corporation?

The Witness: It owns the business, your Honor.

Mr. Bergson: Of course, I do not want to testify, your Honor, but I think the fact is—

Mr. Saunders: I think Mr. Bergson should not testify, your Honor.

Mr. Bergson: All right.

The Court: The Court will hear you, Mr. Bergson.

Mr. Bergson: I think the facts will show that Chestnut Farms Dairy is a division and that National Dairy owns all of the assets here and Chestnut Farms operates as a separate division.

The Court: And yet it is a separate corporation?

Mr. Bergson: My understanding is it is not a separate corporation at this time.

The Court: I don't see that it makes any difference so far as the issues of this case are concerned.

Mr. Saunders: I agree with your Honor. Mr. Diamond should know, however.

Mr. Bergson: I don't think it is particularly important. [fol. 835] The Court: Very well.

Mr. Bergson: I think that concludes the cross-examination.

The Court: Very well.

Redirect examination.

By Mr. Saunders:

Q. So far as you are aware, Mr. Diamond, does Chestnut Farms Division operate on a profitable basis?

A. You mean an over-all profitable basis?

Q. Yes, sir.

A. Not a commendable one.

Q. It has a profit?

A. Yes.

Q. In its competition that you were questioned about, it has a certain point, I take it, beyond which it cannot go in cutting prices in order to retain that position?

A. You—

The Court: I think that goes beyond the scope of the cross examination.

Mr. Bergson: Your Honor, I have no objection if he wants to ask that question.

The Court: Very well. He may answer. Of course, I, [fol. 836] myself, sua sponte, exclude irrelevant testimony. I do not exclude incompetent testimony sua sponte but I have to keep the trial proceeding within its proper channel. However, you may answer.

The Witness: What is the question?

The Court: You may read the question, Mr. Reporter.

(The reporter read the pending question as previously recorded.)

The Witness: Your Honor, we must make a profit.

The Court: Well, of course. That goes without saying. That is the very basis of the American system of private enterprise.

By Mr. Saunders:

Q. Do you know, Mr. Diamond, whether the Embassy Division of the Defendant has operated at a profit since this acquisition by the defendant?

A. I would only have the general knowledge of what statements have been published from time to time in the press. I have no knowledge about what Embassy Dairy does.

Q. If the competition of Embassy is intense, is the value of the information that is obtained in the course of these monthly audits that have been referred to, not [fol. 837] likely to be all the more valuable?

Mr. Bergson: I object to that.

The Court: Objection sustained. That is argumentative and speculative.

Mr. Saunders: Thank you, Mr. Diamond.

The Court: Anything further?

You may step down.

(Witness excused.)

Mr. Saunders: I offer at this time, your Honor, Government exhibit marked for identification No. 64.

Mr. Bergson: May I inquire for what purpose it is being offered?

Mr. Saunders: I might identify the document first. This is a document from the Association's audit files, a document which its employees made while it was going through the books of Thompson's Dairy in April, 1955, and it is offered to show the detailed information which it extracts from Thompson's files, including Thompson's selling prices, a matter which has absolutely nothing to do with the settlement of milk between the Association and Thompson's. The document shows the number of units of each item of milk—No. 64, your Honor.

The Court: Yes, it speaks for itself. It is the information the Association obtained from Thompson's Dairy.

[fol. 838] Mr. Saunders: That is correct, your Honor.

Mr. Bergson: I object to it on the same ground that I objected to the testimony before.

The Court: I will make the same ruling. Objection overruled. I will admit the document. If it has no probative value, it will not affect the disposition of the issues.

Mr. Bergson: I think I should point out at this time, your Honor, that the information regarding prices is average price for which the milk was sold.

The Court: That is what the column says, "Average Price."

Mr. Bergson: Right.

(Government exhibit 64 was received in evidence.)

Mr. Saunders: I offer government exhibit marked for identification as exhibit 63—similar information from the files of Richfield Dairy for the month of May, 1954.

Mr. Bergson: The same objection.

The Court: Let it be admitted.

(Government Exhibit 63 was received in evidence.)

[fol. 839] Mr. Saunders: I offer government exhibit 65, information concerning contract sales by Richfield Dairy for the month of April, 1954.

The Court: I will admit this—

Mr. Bergson: I should like to point out, your Honor, that this information was information obtained before the acquisition of Embassy Dairy.

Mr. Saunders: Does Mr. Bergson contend, your Honor, there has been any change in the practice of recording such information?

The Court: I will admit this. But I want to say this, we have already had oral testimony from Mr. Diamond. You introduced exhibits showing the information obtained from three other concerns. I think you have enough.

Mr. Saunders: This was just about the last.

(Government Exhibit 65 was received in evidence.)

Mr. Bergson: I will stipulate, your Honor, subject to my objection as to relevancy, that we obtained this information from all customers, both before and after the acquisition of Embassy Dairy.

The Court: Very well.

Mr. Saunders: I offer at this time, your Honor, Gov- [fol. 840] ernment Exhibit No. 62. I refer your Honor's attention to the notation appearing at the top of the document.

Mr. Bergson: I object to this document, your Honor, on the ground that it is dated April, 1951. It is 'way beyond the period of relevance in this issue.

The Court: I am inclined to sustain the objection. And, also, there is no evidence as to who put the notation on the exhibit to which Mr. Saunders has called attention. It might have been put on there by somebody who is not clothed with authority to make admissions.

Mr. Saunders: I can clear that up immediately, your Honor, by referring to Defendant's answer to Plaintiff's interrogatory No. 38 of May 19th, in which the defendant admits that this data was recorded by its employee, W. W. Smith.

Mr. Bergson: Wait a minute. The whole answer.

Mr. Saunders: As an auditor for the defendant.

Mr. Bergson: And was voluntarily furnished to the defendant by Irene—

The Court: I will sustain the objection on the ground that it is too remote.

Mr. Saunders: Your Honor, I want to make an offer of proof on this document.

[fol. 841] The Court: You do not need to make an offer of proof. An offer of proof is important only when oral testimony is being given and objection to a question is sustained. Then you must make an offer of proof to show what answer would have been elicited from the witness if the objection had not been sustained. Otherwise, you have no basis for review. But when you offer a document in evidence, and the objection is sustained, the document is the offer of proof. So, an offer of proof is not necessary.

Mr. Saunders: May I be heard, your Honor?

Mr. Bergson has stated to the Court—

The Court: I have sustained the objection. Let us move along.

Mr. Saunders: Your Honor, I think it is vitally important to the Government's case. I respectfully submit that the Government should be allowed to state the connection of this document with the rest of the case.

The Court: What is the connection? That isn't what you wanted to do. You said you wanted to make a tender of proof.

Mr. Saunders: I was going to explain that in that offer.

The Court: No, I will not hear an offer of proof as to [fol. 842] documents.

Mr. Saunders: I will state the connection, your Honor.

Mr. Bergson has stated that the defendant religiously follows the practice of confining information obtained in audits to keeping it from the Embassy Division. This document is submitted to show that an employee of the defendant purloined information from the files of a dealer whom it was auditing.

The Court: Objection sustained. You know, I am not trying the morals of anyone. I am just trying the issue as to whether Section 7 of the Clayton Act was violated by the acquisition of the assets of Embassy Dairy and the stock of Richfield and Wakefield Dairies. That is the only issue for me to determine.

Mr. Saunders: At this time, your Honor, I offer defendant's Admissions Nos. 43—

The Court: No. 43?

Mr. Saunders: No. 43, your Honor.
The Court: Very well.
Mr. Saunders: And No. 665, your Honor.
The Court: 665?
Mr. Saunders: 665.
The Court: Very well.
[fol. 843] Mr. Bergson: Your Honor, just as a matter of procedure, don't you think it would be desirable for Mr. Saunders to identify for the record what these admissions relate to?
The Court: It would be helpful.
Mr. Saunders: I am perfectly agreeable to do that, your Honor.
The Court: Of course, to a very large extent this case is being tried on admissions.
Mr. Bergson: That is right.
Miss Lingreen: Call Mr. A. G. Hilldrup as a witness.
Mr. Bergson: Would you identify those last two?
Mr. Saunders: Admission No. 43 identified Embassy Dairy, Incorporated—
The Court: Just a moment. The witness is waiting to be sworn. Let the witness be sworn.

Thereupon A. G. HILLDRUP was called as a witness by counsel for the Government and, being duly sworn, was examined and testified as follows:

The Court: Now you may proceed.
Mr. Saunders: Admission No. 43 pertained to the identification of Embassy Dairy, Incorporated and the location [fol. 844] of its plant and office.
Admission 665 pertained to the area in which Embassy Dairy, Inc., engaged in the distribution and sale of fluid milk.

Direct examination.

By Miss Lingreen:

Q. Would you state your full name for the Court?
A. Albert G. Hilldrup.

The Court: And your first name?
The Witness: Albert.

By Miss Lingreen:

Q. Are you connected with the Lucerne Milk Company?
A. I am.

The Court: What company? I think you had better speak a little louder.

By Miss Lingreen:

Q. The Lucerne Milk Company.
A. I am.
Q. In what capacity?
A. At the present time I am plant manager of Safeway Stores, Incorporated, Milk Division, Omaha, Nebraska.
Q. Were you employed by the Lucerne Milk Company in Washington in the fall of 1953?
A. I was.
[fol. 845] Q. In what capacity?
A. As acting plant manager.
Q. What were your duties?
A. My duties were the procurement of milk for our plant, the processing and operation of the plant; also to report to our home office in Oakland any changes in the prices of milk either wholesale or retail in the market.
Q. I show you, Mr. Hilldrup, a document which has been marked as Government Exhibit 69 for identification.

Mr. Bergson: This is a document of which you did not furnish us a copy, is that right, Miss Lingreen?
Miss Lingreen: That is right.
The Court: Is there any contest over this document?
Mr. Bergson: I just saw it slightly for a minute in the hall the other day and I would like to have an opportunity to look at it.
The Court: Because, of course, I do not want to consume any time on formal proof or identification of documents unless counsel contests its authenticity.

By Miss Lingreen:

Q. What is that document, Mr. Hilldrup?

A. That is a letter that I wrote to my superior Mr. George Hughes—

The Court: It speaks for itself. Let us move along. I [fol. 846] want to omit all technicalities.

Miss Lingreen: I offer that exhibit in evidence, your Honor.

The Court: Very well.

(Government Exhibit 69 was received in evidence.)

Mr. Bergson: No objection.

Miss Lingreen: Thank you.

Cross examination.

By Mr. Bergson:

Q. Mr. Hilldrup, Exhibit 69 refers to the sale of eggnog.

A. Yes, sir.

The Court: Now, just a moment. Is there any objection?

Mr. Bergson: I already stated that I had no objection.

The Court: I beg your pardon. It may be admitted.

Miss Lingreen: I object to the question, your Honor. It is beyond the scope of the direct examination. Mr. Hilldrup was not questioned concerning the contents of the document.

The Court: This is proper cross examination. Objection [fol. 847] overruled. I want to say to both sides, however, please do not call witnesses to identify documents which are not going to be disputed. It is just a waste of time.

Mr. Bergson: As I say, your Honor—

The Court: You may proceed.

By Mr. Bergson:

Q. This refers to the sale of eggnog, Mr. Hilldrup?

A. Yes, it does.

Q. Do you have any information as to the percentage of sales of eggnog as related to the sales of fluid milk in the Washington metropolitan area?

A. No, sir, I do not.

Q. Would you say it was as much as one-half of one per cent?

A. I would not like to commit myself because I have not the information. It is not very much.

Q. Would you state that it was insignificant?

The Court: Well, I think you have gone as far as you can.

Mr. Bergson: No further questions.

Miss Lingreen: Thank you.

The Court: Anything further?

Miss Lingreen: Nothing further.

[fol. 848] The Court: You may step down.

(Witness excused.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: What I meant by my observation was that if you have exhibits to offer in evidence, just offer them in evidence without calling witnesses to identify them unless the other side disputes their authenticity.

Mr. Saunders: Your Honor, we have several such documents, with the witness present. If your Honor was about to take the morning recess, we could of course show them to counsel in the interim.

The Court: I would rather take the recess a little later. Suppose you go on to something else, then.

Mr. Saunders: At this time I would like to ask the Court to take judicial notice of the decision in the case of Embassy Dairy vs. Camalier reported at 211 Fed. Second, page 41.

The Court: I do not have to do that. You do not have to ask the Court to take judicial notice of a particular decision. You can argue that decision in your argument.

Mr. Saunders: Your Honor, for the findings of fact and the fact that Embassy was the litigant there in the context of that case.

[fol. 849] The Court: I see. Well, I will take judicial notice of it. Just what is the bearing of that, of the findings?

Mr. Saunders: May I describe the entire situation, your Honor? In that case, Embassy challenged a particular interpretation of the District of Columbia Milk Law, placed

upon that law by the District Government. It challenged it successfully. This challenge was successfully decided in favor of Embassy a month or so prior to the Embassy acquisition.

In the document which went into evidence yesterday the Defendant stated that one of the reasons for its acquisition was because Embassy had been attempting to secure interpretations of the milk law in its favor.

The Court: Very well. I think I get your point.

Mr. Bergson: May I make one clarification, your Honor? This case was reversed and sent back for retrial on the factual issues involved.

The Court: I think we are getting a little far afield. Let us not overtry the case, Mr. Saunders. This may have a nebulous relevancy, but it is very remote.

Mr. Saunders: May I point out—

The Court: No, let us move along. You know, we can [fol. 850] prolong the trial indefinitely by taking thirty seconds now, two minutes later and three minutes later for some remarks. Let us move along.

Mr. Saunders: I offer now a document which has been marked as plaintiff's exhibit 18 for identification.

Mr. Bergson: Just a minute, Mr. Saunders. (A short pause) Is that one of the documents that you designated, Mr. Saunders, last night?

The Court: Well, I do not think it is very important but I will admit it.

Mr. Bergson: I do not know what it is, your Honor, I am sorry to say.

The Court: I thought that a list of all proposed exhibits was supposed to be furnished to or exchanged by counsel.

Mr. Saunders: And to the best of our knowledge, your Honor, we tried to do that. There may have been a slipup or two. We have been shifting documents around.

The Court: This is minutes of the Board of Directors of the Defendant of February 12, 1954 at which Colonel Hughes reported relative to the legal aspects of the decision of the Court of Appeals in the Embassy Dairy case.

Mr. Bergson: I agree with your Honor as to its question- [fol. 851] able relevancy but I will not object.

The Court: I am going to admit it.

(Government Exhibit 18 was received in evidence.)

Mr. Saunders: I offer at this time, your Honor, the portion of the stipulation as to a narrative statement of testimony of Arthur Lee Thompson, which has been marked as government exhibit No. 33.

Mr. Bergson: That, again, is not a document that you listed last night.

Mr. Saunders: It is a stipulation in the case, Mr. Bergson, stipulation No. 1.

Mr. Bergson: But I am sure that I have some objections to this because I know that some of it relates to a period far beyond the scope of the inquiry in this case. I have no—

Mr. Saunders: I have not described it yet.

Mr. Bergson: What stipulation number?

Mr. Saunders: No. 1.

The Court: You are offering this—

Mr. Saunders: I am offering portions of it, your Honor.

The Court: You are offering the testimony of Arthur Lee Thompson?

[fol. 852] Mr. Saunders: Yes, sir. The first two paragraphs, that is to say, the paragraph that says "The testimony of Arthur Lee Thompson as to certain facts alleged to be relevent and material to the issues in the pending cause is as follows:" And the first paragraph thereafter.

Mr. Bergson: What was that?

The Court: Very well.

Mr. Saunders: And the last paragraph on that page, to the conclusion, your Honor.

Mr. Bergson: No objection.

The Court: It may be admitted.

(Government Exhibit 33 is admitted in evidence.)

Mr. Saunders: I offer now a document marked as Government Exhibit 17, the portion of stipulation No. 1 pertaining to the narrative testimony of Samuel Harvey, certain portions of the narrative testimony only.

The Court: Which portions?

Mr. Saunders: The two full paragraphs on the second page of Mr. Harvey's narrative statement, the two full paragraphs on the second page of the statement "That about the beginning of the year 1954"—

Mr. Bergson: I object to it on the ground of relevancy. [fol. 853] It seems to have no bearing on the acquisition here in question.

The Court: Let me read it first, and I will pass on it. (Pause.)

I will hear from you, Mr. Saunders. How is that relevant?

Mr. Saunders: It is relevant because it shows, your Honor, that shortly prior to the Embassy acquisition, the defendant had offered to top a price unknown to it by $25,000 in order to purchase another dairy in the market.

The Court: Objection sustained. Well, I think this might be a desirable time to take our midmorning recess, and during the recess, you show the other exhibits to your opponent, Mr. Saunders, so they will not have to be formally identified.

(A brief recess was taken.)

The Court: You may proceed.

Mr. Saunders: I offer plaintiff's exhibits Nos. 70, 71 and 72, which have been authenticated by the defendant during the recess.

Mr. Bergson: I object, your Honor.

The Court: On what ground?

Mr. Bergson: Taking the last two first, your Honor, you [fol. 854] will notice the dates of those letters. I think they are not relevant to the issues here involved. I think they are dated 1950 and 1951. I do not see how they can have any bearing—

The Court: What is the relevancy, Mr. Saunders, of these exhibits?

Mr. Saunders: The relevancy is this, your Honor, to show that Embassy Dairy according to a competitor's analysis of the market situation, was an innovator, was a competitor.

With respect to the time period, I might point out that the du Pont case—

The Court: Was a competitor of whom?

Mr. Saunders: Was a competitive factor in the market.

The Court: I do not suppose there is any denial of that?

Mr. Saunders: We have to prove that they were innovators. Our only competitor with a certain product, one of them reads, is Embassy Dairy.

The Court: I will admit the exhibit. That is so far as 70. Now, so far as 71 and 72 are concerned—

Mr. Bergson: So far as all of them are concerned, we [fol. 855] have admitted their authenticity, but they are all hearsay.

The Court: You did not make that objection.

Mr. Bergson: I did not have an opportunity.

The Court: You objected on the ground of relevancy.

Mr. Bergson: I objected on the ground of relevancy because of the cut-off date that we have been using, but in addition to that, I object to all of them on the ground that they are hearsay.

The Court: I will have to sustain the objection.

Mr. Saunders: The witness will testify they were all made during the course of business—

The Court: These do not come under the Federal Shop Book Rule. In this circuit the Court of Appeals has construed the Federal Shop Book Rule very narrowly. Other circuits are much more liberal than this circuit. For instance, the Second and the Ninth Circuit, I found in holding court this last September in the Southern District of California, the 9th circuit admits medical reports under the Federal Shop Book Rule. Our Court of Appeals does not.

Mr. Saunders: Your Honor, under the circumstances, I will have to call Mr. Hughes as a witness to testify as to his recollection.

[fol. 856] The Court: You may do so. But I think the whole matter is too remote, Mr. Saunders. Do not overlook the fact that I am only trying the third cause of action at this time.

Mr. Saunders: I understand that, your Honor.

The Court: And not the conspiracy cause of action.

Mr. Saunders: May I be heard, your Honor?

The Court: Yes.

Mr. Saunders: In both the du Pont case and in the most recently decided Section 7 case, the Courts looked back five to seven years—

The Court: I know. The du Pont case, as the dissenting opinion shows—you can not gather it from the majority opinion—the du Pont case was largely tried under the Sherman Law cause of action, and the Section 7 of the Clayton Act cause of action was brought in at the last minute and very little attention was paid to it.

Mr. Justice Burton in his dissenting opinion says that only a few pages in the Government's brief were devoted to it and only a few minutes of the oral argument.

Now, I have separated the two causes of action and I am [fol. 858] trying the Clayton Act cause of action now. And there are many items of evidence that would be relevant to your Sherman law cause of action now. And there are many items of evidence that would be relevant to your Sherman law cause of action, the conspiracy, and the monopoly, that would not be relevant to the Clayton Act cause of action. And I think it is conducive to clarity of thought and to simplicity if we separate those two almost as though we had watertight compartments. You know, one of the reasons the du Pont case took from 1949 until 1957 to be decided was because weeks of testimony were taken under the Sherman Act cause of action.

I think you should confine yourself strictly to the acquisition and to the fact that it has a tendency to lessen competition or to create a monopoly.

Mr. Saunders: May I cite authorities?

The Court: On what?

Mr. Saunders: On the proposition that the Government, the plaintiff, in a section 7 case is entitled to show the background setting and what the defendant has done—

The Court: All that is at the discretion of the Court. I am not going to admit that. I think one difficulty in anti- [fol. 858] trust cases is there is too much time spent on background showing and that is why a lot of those cases have taken weeks and months to try when they could be tried in a few days if only somebody put his foot down or held the reins tight. I do not want to mix my metaphors.

Mr. Saunders: I offer now, your Honor, the portion of Mr. Hooper's deposition beginning on page 1136 halfway down the page where Miss Lingreen begins her questioning, through the first question and response on page 1140.

Mr. Bergson: I object, your Honor. This relates to the same matter that was covered in the proposed stipulation—I mean, the stipulation that Mr. Saunders offered in evidence and which you excluded on the ground of irrelevance.

The Court: Objection sustained.

Mr. Saunders: This is testimony by Defendant's Chief officer, your Honor, in which he says that they attempted to buy another dairy because they thought they would lose the business of that dairy if it fell into someone else's hands. This is the same year as the Embassy acquisition.

The Court: That would be relevant on the conspiracy [fol. 859] cause of action.

Mr. Saunders: We respectfully submit it is relevant in the Section 7 cause.

The Court: Objection sustained.

Mr. Saunders: I offer at this time, your Honor, the portion of the testimony on deposition of William B. Hooper which commences at page 744.

Mr. Bergson: Those were not among the pages that you designated to us last night. I would like an opportunity to look at them, your Honor.

The Court: Just a moment. Where does this begin, Mr. Saunders?

Mr. Saunders: At the middle of the page "Do you know an attorney by the name of Chambliss, Mr. Hooper"?

The Court: Oh, yes. And how far does this go?

Mr. Saunders: To the center of page 746, Mr. Hooper's answer beginning "I certainly did."

Mr. Bergson: May I have a moment to look at it, your Honor?

The Court: Yes, indeed.

(A short pause).

Mr. Bergson: I object to this.

The Court: I am inclined to sustain the objection but I [fol. 860] will hear you as to its relevancy.

Mr. Saunders: The relevancy of the offered testimony is this, your Honor, that within six months of the Embassy acquisition, the defendant by various means, including attempting to cause a breach of contract of sale or option, attempted to prevent Embassy Dairy from opening a distribution station in Fairfax, Virginia.

The Court: I am only passing upon the testimony that is now being offered. This testimony indicates that the defendant appeared before an administrative agency and opposed a zoning petition. It is within the legal rights of every citizen to appear before the courts or government agencies and make representations. For that reason, I think it is irrelevant.

Mr. Saunders: Your Honor, this has to be connected with other portions of this testimony.

The Court: I know—

Mr. Saunders: Where Mr. Hooper admits that he encouraged the owner of the property not to sell—go through with the sale.

The Court: That is different. But the fact that somebody goes to court and sues someone else or opposes somebody is not proof of conspiracy. You know, gentlemen, under our constitution everybody has a right to resort to [fol. 861] the courts. I have ruled.

I am going to exclude that. Do not argue with the Court. Make your argument to the Court and then the Court rules.

Mr. Saunders: May I complete my offer of Mr. Hooper's testimony on this point?

The Court: You have offered it.

Mr. Saunders: I have not finished it.

The Court: I am only excluding the portion that you indicated. Of course, if there are other portions you wish to read in evidence—.

Mr. Saunders: In order to make it clear, your Honor, maybe I should restate my offer to run from page 744 through page 750.

The Court: Very well. I will exclude the portions beginning at the middle of 744 and going to the middle of 746.

Mr. Saunders: Is your Honor commencing to read, "Question: Did you make any offer to purchase the land?"

The Court: That is at page 740?

Mr. Saunders: Page 746, your Honor.

The Court: And how far do you want to go?

Mr. Saunders: To page 750, your Honor, top of page 750. [fol. 862] Mr. Bergson: I object to all of this, your Honor, on the ground that it is not relevant—could not possibly be relevant to the Section 7 count that we are now trying.

The Court: Objection overruled.

Now, where do you stop, Mr. Saunders? On what page do you stop?

Mr. Saunders: Page 750, your Honor, where Mr. Bergson interjects.

The Court: Very well.

Mr. Saunders: (Reading)

"Q. Did you make an offer to purchase the land from Mr. Graham?

"A. No, sir.

"Q. Did you authorize Mr. Chambliss to do so?

"A. No, I did not authorize Mr. Chambliss to purchase it. You might be interested to know we now own the land.

"Q. Do you know whether Mr. Chambliss did in fact, make such an offer?

"A. No, I do not. I did not appear at the zoning hearing, and I did not talk to Mr. Chambliss further, after my initial instructions, except by telephone.

[fol. 863] "Q. How many conversations did you have with Mr. Graham while the zoning matter was pending?

"A. I only recall one and that was a conversation with Mr. Graham and his wife the day that I went to Fairfax, and we sat on his lawn and discussed this matter out on the lawn and I remember it very vividly, because about 90 per cent of the discussion was on antiques of which his wife has quite a collection.

"Q. What did you say to Mr. Graham in urging that he not apply for the zoning, or did you urge him not to sell the land?

"A. I did not urge him not to sell the land. I just urged him not to push for rezoning and I used every bit of persuasion—limited as it may be—that I had.

"Q. What did you—what arguments did you advance?

"A. That Mr. Graham was an old member of the Association and that certainly, if his organization felt that this would be detrimental to the organization, that we would like to persuade him not to do something which we felt would be detrimental.

[fol. 864] "Q. How would it have been detrimental to the organization?

"A. Well, in our judgment, we felt that Mr. Ward opening up that station down there would have been very detrimental to us, inasmuch as he would have probably used it as a conduit for bootlegging milk. He had already been doing that in Washington. We felt this would make it even easier for him to bring in illegal milk.

"Q. Is it a fact that Mr. Ward was bringing in bootleg milk?

"A. It certainly is a fact.

"Q. What do you mean by bootleg milk?

"A. Milk not licensed by the District of Columbia, and for which Mr. Ward was arrested once, and a second time, the District of Columbia Health Department picked him up for bringing in illegal milk. However, the case was never carried through the courts in the second instance.

"Q. Isn't it a fact that you cautioned members of the Association from making such allegations, saying that it could not be proven?

"A. What do you mean, could not be proven?

"Q. Isn't it a fact that you have cautioned members of the Association not to make such an allegation?

[fol. 865] "A. I don't recall that I ever asked Association members not to make the allegation—

"Q. Members of the Association or employees, as the case may be.

"A. Not to make any statement that Mr. Ward was bringing in milk that was non-licensed, because that is public knowledge. It was no question of Mr. Ward bringing in unlicensed milk.

"Q. What is your definition of bootleg milk.

"A. My definition of bootleg milk is milk brought in the District of Columbia plant which does not carry a District of Columbia permit.

"Q. Well, then, you would equivocate that with any milk which is non-D.C. licensed being bootleg milk.

"A. The Milk Act of 1925 passed by Congress, specifically lays down regulations with respect to milk that can be brought into the District of Columbia.

"Q. During the war years the Association brought in non-D.C. milk.

"A. That is right.

"Q. Were you bootlegging?

"A. No, sir; because during the war, by proclamation [fol. 866] of the Commissioners of the District of Columbia, it was brought in on an emergency basis.

"Q. When did that proclamation cease to be effective?

"A. I think the District of Columbia Commissioners issued a new proclamation in 19—I think it was 1952 or 1953. Now, I don't know. We have to check on that year. It was either 1952 or 1953.

"Q. Did the Association tell the Fairfax authorities that Mr. Ward was going to bootleg milk?

"A. No, I don't think so. In fact, the Association never made any statement to the Fairfax County authorities. All statements were made by the attorney representing the Association. I was not there. I do not know what statements Mr. Chambliss made.

"Q. You do not know, Mr. Hooper, that an offer to purchase that property was made on behalf of the Association?

"A. No, I do not know it. Such an offer was not authorized, if it was made."

Mr. Saunders: Your Honor, I think I cut it a little short. To the middle of page 751.

[fol. 867] The Court: Beginning where?

Mr. Saunders: Beginning at the middle of page 750 where we left off, your Honor. Where Mr. Bergson is speaking.

The Court: And where do you—

Mr. Saunders: Ceasing at the response "I certainly did," near the top of page 751.

The Court: Very well.

Mr. Bergson: You have ruled on the question of its relevance?

The Court: Yes, I am going to admit that.

Mr. Saunders: (Reading.)

"Mr. Bergson: By whom?

"Mr. Saunders: Pardon me.

"Mr. Bergson: By whom and when? Can you pin it down?

"Mr. Saunders: Mr. Hooper has no direct recollection. I don't have any records with me on that.

By Mr. Saunders:

"Q. Do you know what the agreement between Ward or Embassy and Mr. Graham with respect to the property was?

"A. No, I do not.

"Q. Did you know it was under option?

"A. Yes.

[fol. 868] "Q. Then you do know it was?

"A. I don't know what the agreement was. I know that Ward was going to purchase it and he subsequently did. We had no objections to Mr. Ward buying the land. We had objections to its use.

"Q. Did you know Mr. Graham was a member of the Town Council, of Fairfax?

"A. Yes.

"Q. Did you urge him to use his influence as a member of the Town Council to oppose it?

"A. I certainly did."

Mr. Whitaker: I call to the stand Mr. Roy Swayze.

Thereupon Roy Swayze was sworn as a witness and being duly examined, testified as follows:

Direct examination.

By Mr. Whitaker:

Q. State your full name and address.

A. Roy A. Swayze.

The Court: How do you spell the last name?

The Witness: S-w-a-y-z-e. My address—

The Court: Your first name?

[fol. 869] The Witness: Roy.

My address is 201 Oak Street, Fairfax, Virginia.

By Mr. Whitaker:

Q. What is your occupation or profession?

A. I am an attorney.

Q. Were you ever retained as counsel for Embassy Dairy?

A. I was.

Q. Approximately when?

A. In September, 1953, approximately.

Q. For what purpose were you retained as counsel for Embassy Dairy?

A. Embassy Dairy retained me to assist them in locating a site for a distribution plant in the town of Fairfax.

Q. Were you successful in obtaining such a site?

A. We were.

Q. Who was the owner of that site?

A. We located a piece of ground in the town belonging to Mr. Ashby Graham.

The Court: I want to say this, gentlemen: I am not going to try a great many side issues. I think you have had enough testimony from Mr. Hooper in which he admitted that he tried to block the acquisition of a site in Fair- [fol. 870] fax. I think that is enough for the purposes of this case. I am not going to take testimony as to the details as to how that was accomplished.

Mr. Whitaker: May I make an offer of proof, your Honor?

The Court: Well, the way to make an offer of proof is to ask a question and then if I exclude it, then indicate what the answer is you expect to elicit.

By Mr. Whitaker:

Q. Was a formal contract entered into between Embassy Dairy and Mr. Graham for the purchase of his site?

The Court: Just answer yes or no.

The Witness: Yes, it was.

By Mr. Whitaker:

Q. What were those arrangements?

The Court: Now, I am going to exclude that for the reasons indicated.

The Witness: (sic) Your Honor, the witness, if permitted, would testify that a contract was entered into, a down payment of $500 was made, the purchase price of the land was approximately $9,000 and that this purchase was final, con-

tingent upon the successful application for rezoning of the piece of property.

The Court: I will adhere to my ruling. I think this is [fol. 871] cumulative. That is the reason I am excluding it. You have already shown that they tried to block the acquisition of a site in Fairfax by Embassy Dairy, and I think the details are irrelevant.

Mr. Whitaker: Your Honor, the relevancy, in the government's opinion—

The Court: No, I am excluding it.

By Mr. Whitaker:

Q. Mr. Swayze, did you have occasion to meet a director or officer of the Defendant Association prior to the meeting of the Planning Commission on October 8th?

A. Yes, I did.

Q. Could you give us the circumstances of that meeting?

Mr. Bergson: Who was the officer?

The Witness: The officer was Mr. G. Wallace Carper. I believe at that time he was acting chairman of the Board, or something of that type. He was an official with the Maryland and Virginia Milk Producers Association.

By Mr. Whitaker:

Q. And what did Mr. Carper say to you in that meeting?

A. I met Mr. Carper prior to the meeting, the zoning [fol. 872] meeting in our courthouse. Mr. Carper explained to me that he was going to—

Mr. Bergson: Just a minute.

The Court: Let the answer be finished before you object.

The Witness: Mr. Carper explained to me that he was going to oppose the application—

The Court: Now that we know the tenor of this, I am going to sustain the objection and I want no more questions asked along that line because a ruling to one question protects the government as much as a ruling to 100 questions along the same line. I have indicated that I shall not admit testimony concerning the details of that transaction because it is too remote. That might have a bearing on a

conspiracy charge but I am not now trying a conspiracy charge.

I think you have a very simple case, Mr. Saunders by which you can stand or fall, but do not bring in things that do not bear directly on this cause of action.

By Mr. Whitaker:

Q. Mr. Swayze, did any officer or director or attorney representing the defendant association state to you the reasons why they were opposing and were attempting to keep Embassy Dairy from establishing a distribution plant [fol. 873] in the town of Fairfax?

A. Yes.

Q. And what were those reasons?

The Court: In the first place, who said it?

By Mr. Whitaker:

Q. Referring now to your meeting with Mr. Carper, what reason did he give?

A. Mr. Carper did assign some reasons for his opposition.

Q. What were they?

The Court: Just a moment.

Mr. Bergson: I object on the ground that the statement by Mr. Carper is hearsay, that any statement made by him is not binding on the Association.

The Court: Objection overruled. He is a member of the Board of Directors according to the testimony.

By Mr. Whitaker:

Q. Would you please state those reasons?

A. Mr. Carper said that Embassy Dairy did not purchase all of its milk from the dairies belonging to the Maryland and Virginia Milk Producers Association, that a good part of this milk was received from dairies located from the West and on the Eastern Shore of Maryland, that this milk did not pass the rigid inspection imposed by the Dis- [fol. 874] trict of Columbia, that it was inferior milk and for that reason he was going to oppose that. And, fur-

thermore, most of the dairies in Fairfax County belonged to the Maryland and Virginia Milk Producers Association and that this would be very detrimental to the milk industry in our county. And, he felt that the zoning—the distribution plant would be detrimental to the milk industry in our county.

Q. Mr. Swayze, did you attend the meeting of the Planning Commission on October 8th, 1953?

A. I did.

Q. Was there a representative of the defendant association present?

The Court: I am going to exclude that. Every citizen has a right to appear at a hearing before a governmental agency.

By Mr. Whitaker:

Q. Mr. Swayze, did Mr. Chambliss, the attorney representing the Association—who appeared at the meeting of the Planning Commission on October 8th—state the reason why he was opposing the application of Embassy Dairy, your client?

A. Yes, he did.

Q. And what were those reasons?

[fol. 875] Mr. Bergson: I object, your Honor.

The Court: I am going to overrule the objection. No, I will sustain the objection because I think an attorney's argument is not an admission against his client. That is entirely different from a member of the Board of Directors making a statement. For instance, defense counsel could not use anything Government counsel says at this litigation as an admission for some other litigation.

By Mr. Whitaker:

Q. Mr. Swayze, did Mr. Chambliss, the attorney representing the defendant association at the Planning Commission, state the reason why the defendant association did not want Embassy Dairy—

The Court: Now, you must not do that. I excluded the question. You are just putting it in another form.

Mr. Whitaker: Your Honor, I respectfully submit that Mr. Chambliss in that capacity was acting as agent for the defendant association.

The Court: I have excluded that. Do not do that.

By Mr. Whitaker:

Q. Mr. Swayze, did you attend the meeting of the Town Council of the Town of Fairfax on October 8, 1953?

[fol. 876] A. Yes, I did.

Q. Did Mr. Chambliss, the attorney for the defendant association, attend that meeting?

A. Yes, he did.

Q. Who is Mr. Sherwood?

A. Mr. Stacy Sherwood is a member of the Town Council for the Town of Fairfax.

Q. Did Mr. Sherwood ask Mr. Chambliss what the interest of his client was, the defendant Association?

The Court: Now, Mr. Whitaker, I have ruled, and this is the second time, you are transgressing my ruling. If you were an older lawyer, I would be very angry.

Mr. Whitaker: I apologize, your Honor.

The Court: Do not do it.

Mr. Whitaker: That is all.

Cross examination.

By Mr. Bergson:

Q. Mr. Swayze, do you know whether or not Embassy Dairy bought the property in question?

A. It did not.

Q. Do you know that Mr. Carper was chairman of the Board of Supervisors of Fairfax County at the time of your conversation with him?

[fol. 877] A. Yes, he was.

Mr. Bergson: No further questions.

Mr. Whitaker: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Saunders: At this time I offer defendant's Admission No. 3. I can read it. It is a two-line admission.

Mr. Bergson: This is not one that was designated.

Mr. Saunders: Mr. Bergson, things change in the course of a trial. I cannot guarantee everything that is going to be put in will be told to you in advance.

The Court: I did not get your point, Mr. Saunders.

Mr. Saunders: Mr. Bergson is raising the question that he was not told about this admission last night.

The Court: My direction related only to lists of documents.

Mr. Bergson: Oh, no, your Honor. May I respectfully disagree. You particularly entered an order requiring them to furnish the list of admissions that they intended to use the next day, too.

[fol. 878] The Court: I did?

Mr. Saunders: In any event, we have been doing so but we cannot anticipate everything that is going to arise.

The Court: Proceed. I am not going to go into these matters.

Mr. Saunders: Admission No. 3, your Honor, reads as follows: "G. Wallace Carper of McLean, Virginia was a director of Defendant during the period February, 1950 to February, 1956."

Mr. Bergson: No objection, your Honor.

Mr. Saunders: Mr. George B. Hughes, please.

Thereupon GEORGE B. HUGHES was sworn as a witness and being examined, testified as follows:

Direct examination.

By Mr. Saunders:

Q. Would you state your full name, please?

A. George B. Hughes.

Q. Where do you reside?

A. I reside at 4615 Clemson Road, College Park, Maryland.

Q. You are presently connected with the Lucerne Milk

[fol. 879] Company?

A. I am plant manager of Safeway Stores, Inc., Milk Department.

The Court: You must speak a little louder, because everybody has to hear you. If you wish, you may use the microphone.

By Mr. Saunders:

Q. Was the Department to which you have just referred known as the Lucerne Milk Company at any time?

A. Yes, it was.

Q. During what period of time?

A. Until 1957.

Q. Was it so known in the years 1950, 1951 and 1953?

A. It was.

Q. During that period, the years 1950, 1951 and 1953, were you also connected with the Washington office of the Lucerne Milk Company?

A. I was plant manager at that time.

Q. What were your duties as plant manager, Mr. Hughes, at that time?

A. Well, my duties as plant manager were the general supervision of the operation, procurement of milk, and all related activity and production of a finished product.

[fol. 880] Q. Were part of your duties the making of periodical reports to the headquarters of the Lucerne Milk Company?

A. That is correct.

Q. I show you now Government Exhibit No. 70, Mr. Hughes, marked for identification No. 70, No. 71 and No. 72, and would you state the circumstances under which those documents were prepared?

The Court: Well, now, is there any dispute as to the authenticity?

Mr. Bergson: There is no dispute as to the authenticity of these documents.

The Court: Then you do not need to make formal proof.

By Mr. Saunders:

Q. These documents were made in the regular course of business, Mr. Hughes?

A. They were.

Mr. Saunders: I offer them in evidence, your Honor.

Mr. Bergson: I think, your Honor, you have already ruled on these documents. You ruled they were not—did not come within the Shop Book Rule.

[fol. 881] The Court: No, they do not. You know, for a lay witness to say that a document was made in the regular course of business does not bring it within the Shop Book rule.

I am going to exclude this as not being the type of document that comes within the Federal Shop Book Rule as it has been construed in this circuit. I think perhaps counsel might want to refer to the case of New York Life Insurance Company vs. Taylor, which is the leading case of this circuit and the case of Claines vs. United States which enlarges upon that, and this circuit places a very narrow scope on the Federal Shop Book Rule and construes it to apply only to routine records and routine entries. Now there is a very strong dissenting opinion in the New York Life Insurance Case. For instance, the 9th Circuit, in a fairly recent opinion, expressly adopted the dissenting opinion of Judge Edgerton in the case to which I refer. But I have to follow the majority opinion.

Mr. Saunders: Your Honor, the Government relies, in this antitrust proceeding, upon the rule enunciated by Judge Wyzanski in the United Shoe Machinery Case.

The Court: I know, but I have to follow the ruling of our Court of Appeals rather than the ruling of a District Judge in another circuit.

[fol. 882] Mr. Saunders: I understand that, your Honor, but because this is an anti-trust case being tried without a jury, we believe there is a distinguishing factor there.

The Court: The rules of evidence are the same in a jury case and in a non-jury case. In an antitrust case, as in every other kind of case, I do not think the rules are different. Now, it is true sometimes there is a tendency, in case of doubt, to be more lenient in admitting evidence in a non-jury case than there is in a jury case but this is clearly inadmissible.

Mr. Saunders: May I make one further comment, your Honor?

The Court: May I venture another practical suggestion to counsel? Every counsel, of course, wants to prevail at the trial, but it does not do any good to prevail at the trial if you are going to be confronted with a controversy in another court later on over the inadmissibility of some item of evidence that did not affect the outcome of the trial actually. Now, this is just a practical suggestion, of course. Counsel must be his own guide.

Mr. Saunders: May I be permitted to make a further comment, your Honor?

The Court: Yes.

[fol. 883] Mr. Saunders: We rely upon the Supreme Court case of the United States vs. Cooper Corporation which was cited in Judge Wyzanski's opinion in the United Shoe Machinery case which holds "But in a civil antitrust suit which the Government can secure against a defendant at most an injunction and order without monetary damage,—see United States vs. Cooper, 312 U. S.—the Trial Judge is not required to exclude every type of hearsay evidence which would be excluded in other types of cases."

The Court: I disagree with the learned Judge in that case. The hearsay rule applies to every case and every other rule of evidence applies to every case, be it a little case or be it a big case.

Mr. Saunders: Very well, your Honor. I will be guided by your ruling.

The Court: Of course, if our Court of Appeals said that, I would have to follow that, but I am not going to follow the ruling of a District Judge of another Circuit, a District Judge, by the way, whom I admire for his ability, but I just disagree with him.

By Mr. Saunders:

Q. Mr. Hughes, directing your attention now to the year 1953, do you recall whether or not a product known as Chive-Cottage Cheese was introduced into the Wash-[fol. 884] ington metropolitan area milk market?

A. Yes.

The Court: When was that?

Mr. Saunders: A product known as Chive-Cottage Cheese.

The Court: When?

Mr. Saunders: 1953.

By Mr. Saunders:

Q. Your answer to the question was yes, Mr. Hughes?

A. Yes.

Q. Do you recall by whom that product was introduced?

A. As stated in that document—

Mr. Bergson: I object.

The Court: No. Do you recall?

By Mr. Saunders:

Q. Do you recall, Mr. Hughes?

The Court: You can show him the memorandum to refresh his recollection, if you wish.

Mr. Saunders: I understand that, your Honor.

By Mr. Saunders:

Q. Do you recall, Mr. Hughes?

A. I could not have recalled it without having seen the document.

Q. You have previously seen the document?

A. I have previously seen the document.

Q. Has it or does it not refresh your recollection?

[fol. 885] A. It does.

Q. Can you state who the product was introduced by?

A. There were two dealers who at that time were packaging Chive Cottage Cheese. They were Thompson's and Embassy Dairy.

Q. Did Lucerne Milk Company subsequently package Chive Cottage Cheese?

A. We did.

Q. Directing your attention now to the year 1951, do you—

Mr. Bergson: I beg your pardon. Were you going to 1951?

The Court: Just a moment. Let counsel finish his question.

By Mr. Saunders:

Q. Directing your attention now, Mr. Hughes, to the year 1951, was a product known as concentrated milk introduced into the Washington milk market?

Mr. Bergson: Your Honor, I object on the ground that this is too remote.

The Court: I am going to overrule the objection. This is evidently preliminary.

The Witness: Yes, there was.

[fol. 886] By Mr. Saunders:

Q. Do you know by whom that product was introduced?

A. Chestnut Farms.

Q. Did you have any occasion to determine whether anyone else other than Chestnut Farms was also selling that product after it was first introduced?

The Court: What product was that?

Mr. Saunders: Concentrated milk.

The Court: Concentrated milk?

Mr. Saunders: Concentrated milk.

The Witness: Yes, we did.

By Mr. Saunders:

Q. Who did you determine was also selling concentrated milk?

A. Embassy Dairy.

Q. To your knowledge were any other firms than Embassy and Chestnut selling concentrated milk?

A. I do not recall any, at the moment.

Q. Directing your attention to the year 1950, was a product known as "Half-and-Half" offered for the first time in this market?

Mr. Bergson: I object, your Honor.

The Court: Objection overruled.

This is a preliminary question, evidently. You may [fol. 887] answer.

A. I do not recall the exact date of that introduction. I know it was in that general time.

By Mr. Saunders:

Q. You would fix it sometime around 1950?

A. It was, yes.

Q. And by whom was the product known as "Half and Half" first introduced in this market?

A. I think that Lucerne Milk Company first introduced the product.

Q. What is the product "Half and Half," Mr. Hughes?

A. That is a product made of cream and milk in equal proportions, resulting in a butterfat content of some 12½ per cent.

Q. After the introduction of "Half and Half" in this market, did you have occasion to determine whether other distributors made a move to market half and half?

A. Yes, I did.

Q. Do you recall who the first one to come out after Lucerne was?

A. Embassy Dairy.

Mr. Saunders: Thank you.

Cross examination.

By Mr. Bergson:

Q. Mr. Hughes, do you know how many dairies in this [fol. 888] market sell half and half?

A. At present?

Q. Yes.

A. I assume all of them do.

Q. Now, you referred to Chive Cottage Cheese. What percentage of the total sales of fluid milk of Lucerne Dairy did Chive Cottage Cheese represent?

A. As of today?

Q. As of the time you testified now.

A. We just introduced at that time. It was a very small percentage. I could not tell you what that percentage was.

Q. And as of today?

A. It is still a small percentage.

Q. Can you fix the percentage?

A. I would not want to fix a definite percentage.

Q. Would you say it is more than one percent?

A. Considerably less than one per cent.

Q. Now, as to frozen milk concentrate, what percentage of the fluid milk sales of Lucerne Dairy did frozen milk concentrate represent?

A. We did not package that product for sale.

Q. I thought you testified that you did.

A. We have never offered it for sale.

[fol. 889] Q. You packaged it but never offered it?

A. No, sir, we have never packaged it, nor offered it for sale.

The Court: May I inquire whether concentrated milk is something different from condensed milk?

Mr. Saunders: May we ask the witness, your Honor?

Mr. Bergson: I think we had better have the witness answer that.

The Court: What about that?

The Witness: Yes, sir.

The Court: Very well. That is all I wanted to know. I thought maybe it was a synonym because condensed milk as a matter of common knowledge has been on the market in cans as far back as I can remember. Evaporated milk was used in the army in World War I.

Mr. Bergson: As well you know, your Honor.

By Mr. Bergson:

Q. Are you familiar with the product of "Pineapple-Cottage Cheese?"

A. Yes, sir.

Q. Who introduced that on the market?

A. I do not think I can answer that.

Q. Would it refresh your recollection if I suggested [fol. 890] it was Embassy Dairy?

A. Embassy Dairy may have.

Q. Do you recall when it was introduced into the market?

A. I do not.

Q. Was it after 1954?

A. I could not answer that. I was not in this market at that time.

Mr. Bergson: When I said Embassy Dairy here, your Honor, I forgot your prior admonition to refer only to it as Embassy Division.

The Court: That was not an admonition. It was just a suggestion that would help to keep my thinking clear and it would help keep the record unambiguous.

By Mr. Bergson:

Q. You were not in this market prior to 1954?

A. I did not say that. I said I was not in this market in 1954.

Q. Well, do you know whether it was introduced in 1955?

A. I do not.

Q. Do you know whether it had been introduced prior to 1955?

A. I can fix no date when Pineapple Cottage Cheese was [fol. 891] introduced.

Mr. Bergson: Well, it is not important.

The Court: I do not think it is, either.

By Mr. Bergson:

Q. Are you familiar with the product known as Gaymont Cheese?

A. I have seen such a product, yes.

Q. Do you know when that was introduced into the market?

A. No, sir.

Q. Do you know whether it was before or after August 26, 1954?

A. I think it was after that date.

Q. Do you know who introduced Gaymont Cottage Cheese into the market?

A. Embassy Dairy.

Mr. Bergson: Embassy Division.

The Witness: Embassy Division.

The Court: If it was Embassy Division, then it was after August, 1954.

Mr. Bergson: Right.

The Court: Isn't that the date, August, 1954?

Mr. Bergson: Yes, your Honor. That is the date of transfer of assets. The contract was signed in May but the [fol. 892] actual transfer was in August.

By Mr. Bergson:

Q. You testified that Lucerne Milk Company was a Division of Safeway Stores?

A. No, sir. We are a Department of Safeway Stores.

Q. Let me ask you this: Is Lucerne Milk Company part of the Safeway Organization?

A. It is. It is wholly owned by the Safeway Organization.

Q. Now, in marketing Lucerne Milk and Milk Products, through whom does the Lucerne Milk Company market?

A. In this market we sell only to Safeway Stores.

Q. You have no other customers but your own stores?

A. In this market we do not.

Mr. Bergson: No further questions.

Mr. Saunders: The plaintiff now has no further questions.

The Court: You may step down.

(Witness excused.)

Mr. Saunders: At this time, your Honor—pardon me. (Pause)

OFFERS IN EVIDENCE

Mr. Saunders: At this time, your Honor, I would like to offer in evidence a document which has been marked as plaintiff's exhibit 19 for identification.

[fol. 893] Mr. Bergson: I would like to inquire as to the relevancy of this document, your Honor.

Mr. Saunders: I would like to place it before the Court because testimony by Mr. Hooper, to which that document is related, will be offered immediately after this document is admitted in evidence.

The Court: I will admit it.

Mr. Bergson: May it be admitted subject to motion to strike—

The Court: I never admit evidence conditionally.

(Government Exhibit 19 was received in evidence.)

Mr. Saunders: At this point I am going to offer three questions and answers by Mr. Hooper on deposition. I could read them more quickly, perhaps.

The Court: Very well.

Mr. Saunders: Page 818.

Mr. Hooper was asked about the document which has been admitted in evidence.

"Q. This document, which has been identified as No. 83, Mr. Hooper, is a photostatic copy of a price memorandum to the auditors, is it not; the date of the memorandum being March 18?

[fol. 894] "A. Dated March 18 to the auditors and other personnel in the organization.

"Q. And does it state that a price is not to be released before a certain date?

"A. That is right. The price is not to be released until Tuesday, March 23. The contract period is April, May and June of 1954 and it covers Ft. Belvoir.

"Q. What is the purpose of that specific notation?

"A. I think that would apply to just what I said before, that we did not want to get these prices into the hands of the dealers, because information was getting to people that were using it against our interests and we were losing sales as a result of it.

"Q. Was this directed against any particular dairy? That is, was there a threat on the part of any particular dairy taking business from your customers at this time?

"A. At that time, Mr. James J. Ward, Sr., operating Embassy Dairy, Inc., was taking all of the contract business away from us."

Mr. Saunders: I offer at this time a document which has [fol. 895] been marked as plaintiff's exhibit for identification No. 22.

I might identify this document for your Honor. This is a memorandum submitted by the defendant to the Baltimore Bank for Cooperatives.

The Court: It may be admitted.

(Government Exhibit 22 was received in evidence.)

Mr. Bergson: Your Honor, at this point I think it might be appropriate to point out that these documents are going in evidence with certain underscoring that have not been made known to us. I talked to Mr. Saunders about this last night and he said that he would make known this underscoring to us. But up until this time we do not know what portions of this document he has underlined for your scrutiny.

The Court: Of course the underlining is not a part of the exhibit. It is done only as a matter of assistance to the Court so the Court would not have to read the entire exhibit if only one sentence in it is relied on.

However, I think it would be appropriate if opposing counsel were apprised of the portions of each exhibit that are being called to the Court's attention.

[fol. 896] Mr. Bergson: Would it not be in the interest of saving time, your Honor, if we could indicate in a different color the portions of the document that we think are pertinent?

The Court: Suppose you do it in blue pencil, if you wish.

Mr. Bergson: May we take a little time to do this now?

The Court: No, I would venture to suggest that that be done outside of the court session and then after it is done, at the earliest opportunity when the Court is in session, you can call attention to the parts that have been marked.

Mr. Bergson: We will take the document—the Court's copy, and mark our parts on it at that time.

The Court: Yes, you may do that. But then call the Court's attention to the fact that that has been done. Actually, I am sure there will be no disputes over the underlined facts in this memorandum. But it is helpful to have it in the record.

They always put their best foot forward when they talk to their bankers.

Mr. Bergson: But that memorandum was submitted and also as you say, there is no question that there were certain [fol. 897] overstatements in the memorandum.

The Court: I am not suggesting an overstatement but I am suggesting emphasis on favorable aspects.

Mr. Bergson: Our copy of this memorandum, your Honor, indicates that it was part of an application.

Mr. Saunders: I am willing to stipulate that, your Honor.

The Court: I presume it was connected with an application for a loan. That is what people go to their bank for.

Mr. Bergson: And I venture to suggest this should go in with the application.

The Court: I think each counsel has a right to make his own offer. If you want to put the application in, you may do so.

Apparently this was an attempt to borrow money from a bank in order to pay for the Embassy acquisition.

Mr. Saunders: That is what it is.

Mr. Bergson: That is right.

The Court: Is that it?

Mr. Bergson: That is right, your Honor.

The Court: Very well.

What is the number of the exhibit introduced on Monday which was a statement by Mr. Hooper, a circular statement [fol. 898] to the members?

Deputy Clerk: No. 21, your Honor.

The Court: Oh, yes.

Mr. Saunders: I offer at this time a document which has been marked for identification as Plaintiffs exhibit 29.

The Court: 29?

Mr. Saunders: 29. This is the agreement of acquisition attached to which—and I realize it is rather bulky—is a map which opens up to a fairly good size.

The Court: Very well. It may be admitted.

(Government Exhibit 29 was received in evidence.)

Mr. Saunders: There are marked portions, your Honor, pages 5 and 6.

The Court: Did you wish to be heard, Mr. Bergson?

Mr. Bergson: No, your Honor. I just want to see what he marked.

The Court: Paragraphs 6 and 10 are marked.

Mr. Bergson: No objection.

Mr. Saunders: I offer plaintiffs exhibit 30 for identification.

Mr. Bergson: No objection.

[fol. 899] The Court: It is received.

(Government Exhibit 30 was received in evidence.)

The Court: Is there anything underlined in that?

Mr. Saunders: No, your Honor.

I offer government exhibit No. 31, the bill of sale in connection with the Embassy acquisition.

Mr. Bergson: Is anything underlined?

Mr. Saunders: No.

Mr. Bergson: No objection.

The Court: It may be admitted.

(Government Exhibit 31 was received in evidence.)

Mr. Saunders: I offer plaintiffs exhibit for identification 32, there are portions marked in this document.

The Court: It is received.

(Government Exhibit 32 was received in evidence.)

Mr. Saunders: I offer government exhibit 28 for identification.

The Court: The Court is very grateful to counsel for arranging these exhibits in these binders. It makes it very easy to turn to them and to use them.

Mr. Saunders: Plaintiffs Exhibit 28, Your Honor.

[fol. 900] The Court: Is that the exhibit entitled—Oh, I see. I have it.

Mr. Saunders: A memorandum dated May 18, 1954.

I might make one connecting comment on this. It sets a price for bids coming up between the date of the memorandum and May 25 and states that a new price will be set beginning May 26.

The document which is the acquisition agreement received in evidence was dated May 26.

(Government Exhibit 28 was received in evidence.)

Mr. Saunders: I offer in evidence at this time, your Honor, the portion of Mr. Hooper's testimony appearing at page 1070 of the transcript of his deposition.

The Court: Very well.

Mr. Saunders: It would be helpful if I read it, perhaps? It is less than a page, your Honor.

The Court: Very well.

Mr. Saunders: "Question: Now you submitted this memorandum"—referring to the exhibit which your Honor commented upon, the memorandum to the bank—"now you submitted this memorandum in the course of applying for a loan of several million dollars from this Bank of Cooperatives?

[fol. 901] "A. That is correct, and there are no false statements in it.

"Q. This statement appearing in the second and last paragraphs on page 3 is, of course, therefore a truthful statement: 'The purchase of Embassy Dairy will eliminate a disturbing influence which has been a thorn in the side of the Association for many years'?

"A. That is an understatement.

"Q. In what way is it an understatement?

"A. Because Embassy Dairy has been a thorn in the side of the Association for a good many years.

"Q. Well, to state it so it won't be an understatement, what would you say?

"A. I would say that the elimination of Embassy Dairy in the Washington market would be of great value to all of the producers in the entire Washington milk market beyond the calculation of a few thousands or hundreds of thousands of dollars."

Now then the portion commencing on page 1072 is offered in evidence, that portion beginning with the second question, "Mr. Hooper, what was the basis of your supporting the statement that you made in the third to the last paragraph on page 3 'Embassy Dairy does between 8 and 9 million dollars annual business'?

[fol. 902] "A. The basis of that was the statement made to me by Mr. Ward when he was offering the dairy for sale.

"Q. Did you have occasion to check and determine whether that representation by Mr. Ward, if made, was a truthful one?

"A. At that time, I don't know whether we had seen his financial statement or not. I rather doubt it. We took his statement. I don't recall whether Mr. Ward furnished me with actual financial figures at that time. I think we used the statement made by Mr. Ward.

"Q. You were telling the bank you were asking to make you a several million dollar loan, you are telling them as a fact that Embassy Dairy does between 8 and 9 million annual business.

"A. All right, so if I wanted to accept Mr. Ward's statement as a fact, that was up to me to make it and also up to the bank to check and verify those facts which I am certain they verify any figure they want to verify before making a loan.

"Q. Did you have occasion to determine at a later date whether or not Embassy Dairy did between $8 and $9 million annual business?

"A. Yes, after we took it over.

"Q. You had occasion to check?

"A. Well, we certainly had the business, beginning August 1, 1954.

"Q. Did you find that Embassy Dairy had done between $8 and 9 million annual business?

[fol. 903] "A. I found they had at times done that much by questioning their people. We never got the Embassy Dairy books. We only bought the assets. We did not buy the corporation and therefore we were not entitled to their general ledger prior to the date, but based on all figures and all information we got, I would say the statement made was substantially correct.

"Q. You make the further statement which actually is a continuation of the sentence, the first part of which I read when I read the last quotation—'Embassy Dairy does between 8 and 9 million dollars business annually, which business the Association will get and in large part retain.' Just as an approximation, Mr. Hooper, what percentage of the Embassy business did the Association retain in comparison to that which you got?

"A. Offhand I would say about 60 to 65 per cent."

At this point I would like to direct your Honor's attention to a stipulation which will cover a number of documents to be offered. Stipulation No. 2 which was entered between the parties and is part of the file in this case, provides that certain documents written by officers of the Baltimore Bank for Cooperatives which were made at or about the time of the conferences between Bank officials and representatives of the Association may be offered. That is, certain marked portions of them which have been agreed to between the parties may be offered by the Government as the testimony of those persons if they were called. The defendant has reserved the right to cross examine.

The Court: Very well.

[fol. 904] Mr. Saunders: I offer plaintiff's exhibit 24, copy of which your Honor has in the bound volume, that is the memorandum of April 16, 1954, B-1.

The Court: It is admitted.

Mr. Bergson: No objection.

Mr. Saunders: I offer plaintiff's Exhibit 25.

The Court: Just a moment. Very well.

(Government exhibits 24 and 25 are received in evidence.)

Mr. Saunders: I offer exhibit 26, another memorandum of a bank conference dated May 16, 1954, there are marked portions on the first and third pages.

The Court: Very well.

Mr. Saunders: I offer plaintiff's exhibit 27 in evidence and in fairness, I believe we have given the court pages of a secretary's report, that is secretary of the bank dated 6-8-54.

Mr. Bergson: It seems it should go in entirely.

The Court: You have a right to offer any other portions that explain or qualify the portions offered. It may be admitted.

Mr. Saunders: Pages 5 and 6 are marked, your Honor.

The Court: Very well. It is received.

(Government exhibits 26 and 27 were received.)

The Court: We will suspend at this time for luncheon.

(At 12:30 the hearing was recessed until 1:45 p.m.)

[fol. 905] AFTERNOON SESSION

(Thereupon, the trial was resumed at 2:00 o'clock p.m.)

The Deputy Clerk: United States of America vs. Maryland and Virginia Milk Producers Association.

The Court: We will proceed with the case on trial.

Mr. Saunders: I have just obtained Mr. Bergson's consent to state for the record, and Mr. Bergson, I think will agree, that the defendant will stipulate for the purposes of this case that all milk purchased by Thompsons Dairy during the period 1953 to 1957, inclusive, was D. C. licensed milk.

The Court: Is that stipulated?

Mr. Bergson: No objection to this stipulation, Your Honor.

The Court: Very well.

Mr. Saunders: Mr. James J. Ward, Jr., please.

Thereupon, JAMES J. WARD, JR., was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr Saunders:

Q. Would you state your name to the Court, please?

A. My name is James J. Ward, Jr.

Q. Where do you reside, Mr. Ward?

[fol. 906] A. In Baltimore, Maryland.

Q. Were you an officer of the company formerly known as Embassy Dairy, Inc., which engaged in the milk distribution business in Washington, D. C.?

A. Yes, I was.

The Court: An officer of what company?

Mr. Saunders: Embassy Dairy, Inc.

By Mr. Saunders:

Q. Do you appear here today pursuant to a subpoena?

The Court: I think it makes no difference, Mr. Saunders.

By Mr. Saunders:

Q. I show you now four documents and ask if you can identify them, Mr. Ward.

The Court: Is there any contest over those documents?

Mr. Bergson: There is no contest that they are the financial reports of Embassy Dairy.

The Court: Then you do not need any formal proof.

Mr. Saunders: May I have a moment, Your Honor?

The Court: Surely. Take all the time you need.

Mr. Saunders: I ask that the four financial statements of Embassy Dairy, Inc., that is, for the years ending every September 30, 1951, '52, '53, and '54, be marked as Govern-
[fol. 907] ment's Exhibit for identification.

The Court: Are you going to offer them in evidence or are you marking them for identification?

Mr. Saunders: I am having them marked for identification.

The Court: Are you going to offer them later?

Mr. Saunders: We may, Your Honor.

The Court: There is no use marking them if you are not going to offer them. That just encumbers the record. Let them be marked.

(Thereupon, Financial Statements were marked Government's Exhibits 75, 76, 77, and 78, for identification.)

The Court: You may proceed.

By Mr. Saunders:

Q. Mr. Ward, is John Ward your brother?

A. Yes, he is.

Q. Your father is James J. Ward?

A. That is right.

Q. He was formerly president of Embassy Dairy, Inc.?

A. Yes.

Q. Was John Ward an officer or director of Embassy Dairy, Inc.?

A. No, he was not.

Q. Did John Ward publicly represent Embassy Dairy in
[fol. 908] any capacity?

A. No.

Q. Was John Ward an officer of Green Spring Milk Company?

A. No.

Q. You are an officer of Green Spring Milk Company?

A. That is right.

Q. Were you, as of 1954?

A. Yes.

Q. Was John Ward an officer of Green Spring Dairy?

A. No, he was not.

Q. As of 1954, you were an officer of Green Spring Dairy?

A. Yes.

Q. Was John Ward an officer of Homestead Dairy Products Company?

A. No.

Q. As of 1954, you were an officer?

A. Yes.

Q. I show you a document, Mr. Ward, and ask if you can identify that document.

The Court: Are these some documents that you are trying to prove? Have you shown them to the other side?

Mr. Saunders: Yes.

[fol. 909] The Court: Will the other side stipulate as to their authenticity?

Mr. Bergson: I cannot, Your Honor. I just saw them a few minutes ago and I did not want to take the time of the Court to read the documents while he is examining the witness. I hate to cause this delay.

The Court: Very well.

What is that document?

The Witness: This is Articles of Incorporation of Homestead Dairy Products Company.

The Court: I do not think we ought to waste time making formal proof of that kind unless it is something important.

Mr. Saunders: I ask to have this marked for identification.

The Court: No, I am not going to waste time marking them for identification if you are going to offer it in evidence.

Mr. Saunders: I offer it.

The Court: When you have a great many documents and have them marked for identification and offer them later that wastes time.

Mr. Bergson: May I have an opportunity to examine the documents, Your Honor?

[fol. 910] The Court: I am going to admit it. It is Articles of Incorporation.

Mr. Bergson: It is a Minute Book, too.

The Court: Very well. You will have an opportunity to examine it unless you are going to object on the ground it is not properly proved.

Mr. Bergson: I do not know how I can do that.

The Court: I think, however, that should be made available to counsel after Court recesses for the day. I instructed counsel to serve on opposing counsel a list of documents in advance of the trial.

Mr. Saunders: Your Honor, this is a matter which we attempted to obtain a stipulation on.

The Court: Was that included in your list?

Mr. Saunders: I advised Mr. Bergson, yesterday, that we would introduce it.

The Court: I think it should have been included in the list served prior to the trial. That is the reason I insisted on exchange of lists of that kind.

Mr. Bergson: These documents were not on the list that was designated prior to trial. They were not on the list that was designated last night. When they asked us to stipulate, they did not have these documents.

The Court: I am not going to add to the unnecessary [fol. 911] consumption of time by discussing the matter but I think they should have been on the list.

Mr. Saunders: May we proceed in some other fashion?

The Court: Yes, you may proceed.

By Mr. Saunders:

Q. Can you identify this document, Mr. Ward? A. These are the Articles of Incorporation and Minute Books of the Green Spring Milk Company, Inc., a Maryland corporation.

Mr. Saunders: I offer it in evidence.

The Court: I can see the relevancy of Embassy Dairy but what is the relevancy of this other company?

Mr. Saunders: These are the companies which entered into covenants not to compete and, in addition, John Ward was a party to those agreements and it is the Government's position as to John Ward and as to Homestead Dairy Products Company, if there was a lawful contract of acquisition for the protection of defendant's interests that these additional parties should become parties.

The Court: How is that relevant to Section 7 of the Clayton Act? I think that is obviously relevant under the conspiracy.

Mr. Saunders: These are part and parcel of the acquisition.

[fol. 912] The Court: As part of the res gestae they may be admitted.

(Thereupon, Articles of Incorporation and Minute Book of Green Spring Milk Co., Inc., and Homestead Dairy Products Co., were marked Government's Exhibits 79 and 80, for identification, and received in evidence.)

The Court: Is there any particular portion of these minutes that you desire to call to the Court's attention?

Mr. Saunders: Not at this time, Your Honor.

The Court: Very well.

Mr. Saunders: May I ask permission of the Court for leave to substitute copies for the originals and return these to the witness?

The Court: Yes, indeed. I suppose counsel for the defendant has no objection to that.

Mr. Bergson: I beg your pardon?

The Court: Leave has been asked by Mr. Saunders to substitute copies for the originals.

Mr. Bergson: I have no objection.

May I ask Your Honor's indulgence for a moment before I start cross examination?

The Court: Surely.

Cross examination.

By Mr. Bergson:

Q. Mr. Ward, you stated John Ward was your brother?
[fol. 913] A. That is correct.

Q. Is John Ward still living?

A. Yes.

Q. What is the relationship between Green Spring Dairy, Inc., and Embassy Dairy, Inc.?

A. Green Spring Dairy, Inc., is the parent company. Embassy Dairy, Inc., is a wholly-owned subsidiary.

Q. Embassy Dairy, Inc., is a wholly-owned subsidiary?

A. That is right.

Q. Who was the owner of Green Spring Dairy, Inc.?

A. The stockholder, the one who owned all of the stock was my father, James J. Ward.

Q. And he was the president of Embassy Dairy, Inc.?

A. That is correct.

Q. And what is the connection between Green Spring Dairy, Inc., and Green Spring Milk Company?

A. Green Spring Milk Company, Inc., a Maryland corporation, was a wholly-owned subsidiary of Green Spring Dairy, Inc.

Q. The company of which your father owns 100 per cent of the stock?

A. That is correct.

Q. And what is Homestead Dairy Products Company? What is its connection with Green Spring Dairy, Inc.?
[fol. 914] A. It has no direct connection. It is an affiliated corporation.

Q. Who owns the stock of Homestead Dairy Products?

A. James J. Ward, Sr.

Q. In what areas does Green Spring Dairy, Inc., do business?

A. It does business primarily in the Baltimore metropolitan area.

Q. Where else does it do business?

A. It goes as far north as Havre de Grace.

Q. I think perhaps I can simplify this. Does it sell any milk in the Washington metropolitan area at all?

A. Green Spring Dairy, Inc., does not.

Q. Does Green Spring Milk Company sell any milk in the Washington metropolitan area?

A. Yes.

Q. In what area?

A. It would be the area just east of Bowie, Maryland, that section.

The Court: Does the Washington metropolitan area extend that far?

Mr. Saunders: The admission heretofore entered into in this case is that according to the 1950 census definition, the Washington metropolitan area consists of two counties to [fol. 915] the north and two to the south.

The Court: Bowie is in Prince Georges County, I believe.

By Mr. Bergson:

Q. I invite your attention to Government's Exhibit No. 32, which is an agreement signed on May 26, 1954, signed by James J. Ward as President of Green Spring Dairy, Inc., Green Spring Milk Company, Homestead Dairy Products Company, James J. Ward, Sr., James J. Ward, Jr., John A. Ward and R. Jean Ward, and ask you whether, under this agreement, Green Spring Dairy and Green Spring Milk undertook not to sell milk in the Washington metropolitan area.

The Court: I think the agreement speaks for itself, Mr. Bergson.

Mr. Bergson: I think it does, Your Honor.

By Mr. Bergson:

Q. Who is R. Jean Ward?

A. She is my sister.

Q. Does R. Jean Ward have any connection with any of these corporations?

A. Not any more.

Q. Did she in May of 1954?

A. Yes, she was the vice president of Embassy Dairy, Inc.

[fol. 916] Q. Did she hold office in any of the other companies?

A. No.

Q. When you and your father were operating Embassy Dairy in the Washington metropolitan area, did you have any contracts with D. C. licensed milk producers?

A. Yes, we had contracts with them.

The Court: When you say "you," to whom do you refer?

Mr. Bergson: Embassy Dairy, Inc.

Mr. Saunders: Your Honor, I believe that the cross examination is now well outside the scope of the direct examination.

The Court: I really think it is, I think I have to sustain the objection.

Of course, you may call this witness back as your own witness if the necessity arises.

Mr. Bergson: In order to save time, Your Honor, and maybe to spare the witness the burden of returning, may I have some exhibits marked for identification at this time?

The Court: Yes, you may do so, or, even if you wish, you may ask him these questions with the understanding that you are doing so as though he was your witness. That might save the witness another trip to Washington. I think he said he lives in Baltimore.

[fol. 917] Mr. Bergson: I think I would prefer to do it the other way, Your Honor.

The Court: Very well. I think it is more orderly.

Mr. Saunders: May I inquire, for I am not quite certain what Mr. Bergson's decision is, Your Honor.

The Court: He is not going to examine him as his own witness at this time.

Mr. Bergson: I merely asked him to identify some documents.

The Court: That, you may do, without making him your own witness at this time.

Mr. Bergson: While they are looking for the number maybe I can save time by showing the witness the documents.

By Mr. Bergson:

Q. I show you a document on the stationery of Embassy Dairy, Inc., addressed "Dear Producer" signed James J. Ward, President, and ask you if that signature is the signature of James J. Ward.

A. Yes, that is his signature.

(Thereupon, Letter on letterhead of Embassy Dairy, Inc., addressed "Dear Producer" was marked Defendant's Exhibit 3, for identification.)

By Mr. Bergson:

Q. I show you a document entitled, "Milk Contract, Embassy Dairy, Inc.," bearing the signature, "Embassy Dairy, [fol. 918] Inc., by James J. Ward." Is that the signature of Mr. James J. Ward?

A. Yes, that is his signature.

Q. Is this the form of contract generally used by Embassy Dairy, Inc., in contracting with its shippers?

A. Yes.

(Thereupon, document entitled Milk Contract, Embassy Dairy, Inc., was marked Defendant's Exhibit No. 4, for identification.)

By Mr. Bergson:

Q. I show you a photostatic copy of a document entitled "Milk Contract, Embassy Dairy, Inc.," dated the 27th of July, 1954, and signed James J. Ward. Is that the signature of James J. Ward?

A. Yes.

Q. Is this the form of contract customarily used by Embassy Dairy, Inc., after June 1, 1954?

A. Yes.

(Thereupon, photostatic copy of document entitled "Milk Contract, Embassy Dairy, Inc.," dated July 27, 1954, was marked Defendant's Exhibit No. 5, for identification.)

Mr. Bergson: Your Honor, I would like to reserve the right to call Mr. Ward to the stand in our own case.

The Court: You have the right to do that.

[fol. 919] Mr. Bergson: Without subpoena?

The Court: If he will come without subpoena, that is for him to decide.

Mr. Bergson: We will do it with the subpoena so he will not have to make the decision.

No further cross examination.

The Court: You may step down.

(Witness was excused.)

Mr. Saunders: Mr. Harry C. Burch, please.

Thereupon HARRY C. BURCH was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Saunders:

Q. Would you state your full name, please?

A. Harry C. Burch, B-u-r-c-h.

Q. Where do you reside, Mr. Burch?

A. Baltimore, Maryland.

Q. Where are you employed, Mr. Burch?

A. Green Spring Dairy.

Q. Do you have any position with that company?

A. Accountant with Green Spring Dairy and my duties are concerned with the accounting for milk, receipt and [fol. 920] disposition, and the payment to farmers.

Q. Mr. Burch, have you, pursuant to a subpoena, brought with you documents of Green Spring Dairy showing payments to farmers for milk received during the period 1954, 1955, and into 1956?

A. The documents to which you refer and which we brought with us cover the period September, 1954, through December 1955, and that refers to the month in which the milk was received from farmers.

Q. Are these the documents (indicating) at the far end of the table, Mr. Burch?

A. Yes, they are.

Mr. Saunders: I ask that they be marked as a group as Government's Exhibit 81 for identification.

The Court: Let them be so marked.

(Thereupon, documents of Green Spring Dairy showing payments to farmers, etc., were marked Government's Exhibit 81, for identification.)

The Court: I wish we did not have to go through all this formal proof. I think the other side ought to stipulate that these are what they purport to be and waive formal proof because two minutes here and two minutes there and you will consume a couple of hours and that multiplies some more with unnecessary formality. However, proceed.

[fol. 921] Mr. Saunders: I have no further questions.

How did you describe those documents? The Clerk would like to have some description, Mr. Burch.

The Witness: Those are copies of the vouchers which were used to pay the farmers. They are carbon copies. One part of them is the check and the other part is the computation of payment.

Cross examination.

By Mr. Bergson:

Q. These are vouchers of Green Spring Dairy, Inc.?

A. They include vouchers of Green Spring Dairy, Inc., and also vouchers of Embassy Dairy.

Q. Do they relate to vouchers to shippers over shipped to the Washington market?

A. There are vouchers in there for shippers who shipped to the Washington market prior to purchase of Embassy Dairy.

Q. Are they limited to those?

A. No, they are not.

Mr. Bergson: I suppose this is not the proper time to object, Your Honor.

The Court: These documents have not been offered in evidence.

Mr. Bergson: That is all.

The Court: You may step down.

(Witness was excused.)

Mr. Saunders: I offer at this time, Your Honor, Defendant's Admission No. 1050 which has been marked Government's Exhibit 35 and which appears in Your Honor's documents.

The Court: It may be admitted.

(Thereupon, Defendant's Admission No. 1050, heretofore marked Government's Exhibit 35, for identification, was received in evidence.)

Mr. Saunders: I might make some brief description.

The Court: Yes, you may do so.

Mr. Saunders: This is the list in or about May of 1954 of approximately 120 farmers, that is, suppliers of D. C. licensed milk, who were shipping milk to Embassy Dairy, Inc., independently of the defendant.

The Court: Very well.

Mr. Saunders: I offer at this time document which has been marked as Government's Exhibit No. 36, for identification. This document consists of a group of admissions which have been put together because they all relate to the same subject matter and they are admissions Nos. 1252 through 1268, inclusive; 1270 through 1276, inclusive; 1279 to 1363, inclusive; 1365, 1367 and 1368; 1482 through 1484, inclusive; 1535 and 1536.

The Court: Do I gather correctly that they are admis-
[fol. 923] sions of the names of persons who shipped milk to Green Spring Dairy, some of which was reshipped to Thompson's Dairy, here in Washington?

Mr. Saunders: Not precisely, Your Honor.

Taking the former list, that is the document which has now been admitted as Exhibit 35, the list of the Embassy producers as of May, 1954. These admissions now marked as a group as Government's Exhibit 36, tell what happened to that particular group in the period subsequent to the acquisition.

The Court: Can you summarize what happened?

Mr. Saunders: We will, later.

The Court: Suppose you do it now in a general way.

Mr. Saunders: Yes, Your Honor, I can.

The facts, I believe, will show that except for about 40 of the 120—I may be off one or two, three or four, possibly—except for about 40 of them, the producers on the original list, Exhibit No. 35, will show are no longer independently shipping their milk to the Washington milk market.

The Court: Some of them are shipping to Thompson's Dairy?

Mr. Saunders: That is right. They would be included among the 40 I mentioned.

The Court: Mr. Bergson, were you about to address the Court?

[fol. 924] Mr. Bergson: We have charts on this and we were going to introduce them in our case but, if they would be helpful to Your Honor—

The Court: I just wanted to get a one-sentence summary of these admissions and that is what Mr. Saunders has given me.

It will be admitted.

(Thereupon, Government's Exhibit No. 36, previously marked for identification, was received in evidence.)

Mr. Saunders: I now offer in evidence a portion of Mr. Hooper's testimony on deposition page 123 which consists of two questions and two answers. I will be glad to read them.

The Court: You may read them into the record.

Mr. Saunders: (Reading):

"Question: Commencing on what date did the Association begin to operate Embassy Dairy, as part of its organization?

"Answer: August 1, 1954.

"Question: Were there any changes in the utilization of milk by Embassy? That is, from the Association versus other sources, prior to that time?

"Answer: Yes. In the month of July, during the month [fol. 925] of July, Mr. Ward came to us and said that he was going to—he wanted to start integrating the producers into his Baltimore operation, and wanted to know if we would furnish him milk during that period of integration

by moving our producers in as he moved his producers out; and if we could sell him that milk for that period on the blend price—our blend price for the month—which was the same price he had been paying his producers, so that financially, he would be the same as if he had kept the producers there, and we could see nothing wrong with that, and agreed to do it. I forget what date in July that started. It was a gradual thing. I think it started with a few producers and built up until by the last day, there was a total replacement."

Mr. Bergson: No objection.

Mr. Saunders: I offer the portion of Mr. Hooper's deposition which appears at page 1046, two questions and two responses, Your Honor:

"Question: Mr. Hooper, since the acquisition by your Association of the Embassy plant and business, has there been any milk supplied by others than your Association [fol. 926] processed in or distributed from the Embassy plants?

"Answer: Milk?

"Question: Yes.

"Answer: Not to my knowledge."

Mr. Bergson: No objection, Your Honor.

Mr. Saunders: I offer at this time Defendant's Admission No. 401—I will withdraw this. I think it will be taken up under another heading.

The Court: Very well.

Mr. Saunders: I now proceed to offer certain documents which are covered by the stipulation referred to this morning which enables the Government to offer the memorandum made by bank officials in lieu of their testimony.

I therefore offer Government's Exhibit for identification No. 38.

The Court: It will be admitted.

(Thereupon, document on stationery of Baltimore Bank for Cooperatives, signed by Jack R. Cobb, was marked Government's Exhibit No. 38, for identification and received in evidence.)

The Court: This document is signed by Jack R. Cobb as Assistant Treasurer. I assume he is Assistant Treasurer of the bank.

Mr. Bergson: No question about that, Your Honor.

The Court: Very well. I just wanted to be sure he [fol. 927] was not the defendant's assistant treasurer.

Mr. Saunders: No.

Stipulation No. 2, Your Honor, provides that certain portions of these documents may be offered and received in evidence in lieu of the testimony of the persons who wrote them.

I offer at this time Government's Exhibit, for identification, No. 39.

(Thereupon, document dated August 20, 1954, was marked Government's Exhibit No. 39, for identification and received in evidence.)

Mr. Saunders: I offer in evidence Government's Exhibit, for identification, No. 40. This is a memorandum dated February 15, 1955.

The Court: It may be admitted.

(Thereupon, document marked Government's Exhibit No. 40, for identification, memorandum dated February 15, 1955, was received in evidence.)

Mr. Saunders: The marked portion is on page 3, Your Honor.

The Court: Very well.

Mr. Saunders: I offer now portions of Mr. Hooper's testimony commencing at page 126. Shall I read this? It is about two pages.

[fol. 928] The Court: It will be considered as read and, of course, it will be transcribed into the record but I will read it silently to myself to save time.

Mr. Saunders: It starts almost at the top of page 126 and continues into page 127 and ends with "price-cutting tactics."

The Court: Yes.

"Question: Going back to the Association's plans when it purchased Embassy, was it not the intention of the Association to eliminate price discount business in the Washington market?

"Answer: No. That would have been rather an ambitious program.

"Question: The Association representatives—particularly yourself—never told officials of the Baltimore Bank for Cooperatives that after completing certain Government contracts, that were in effect when you took over, it was the Association's intention to gradually eliminate all price discount business and to lead the way into removing price cutting from the Washington market?

"Answer: Mr. Saunders, I made the statement to the Baltimore Bank for Cooperatives and to many other people, much to my regret at the present time, that [fol. 929] Embassy Dairy was going to discontinue all discount business, and as a result, we almost lost all of our business, so we meet competition now.

"Question: But in addition to that, in addition to saying you were going to eliminate all price discount business, did you not also say that you were going to lead the way in removing price cutting from the Washington market?

"Answer: I would think if we cut out our discount business, inasmuch as if we did it we would be the only ones to do it, we would certainly be leading the way.

"Question: Well, do you deny making the latter part of the statement which I asked you about, mainly, that it was the Association's intention to lead the way into removing price cutting?

"Answer: I certainly did not make a statement, as such. I do not deny making a statement it was my intention, our intention, to have Embassy discontinue its price-cutting tactics."

The Court: Very well.

Mr. Saunders: And the portion of Mr. Hooper's deposition commencing on page 155 in the middle of the page, the question beginning, "You indicated that the Asso- [fol. 930] ciation." I offer that continuing on to page 156, the middle of the page where it ends "It certainly was."

The Court: Very well.

Mr. Saunders: (Reading):

"Question: You indicated that the Association, after acquiring Embassy, set out to eliminate the discount structure which Embassy had operated under, Mr. Hooper?

"Answer: We started to reduce it.

"Question: Reduce it. You started to raise the prices?

"Answer: We started to lower the discount rate.

"Question: Which means you started to raise the prices?

"Answer: In effect, yes.

"Question: Which Embassy had been charging?

"Answer: The net price, yes.

"Question: Will you tell us where you tried to do that?

"Answer: Well, I cannot give you details. I can tell tell you only my instructions. My instructions to the manager at the plant was to look over his accounts and where there were excessive discounts, to bring them in line [fol. 931] and work toward the end of cutting out discounts except for quantity discounts and put them on a uniform basis.

"Question: You termed, I believe, on one occasion or another, the discounts which Embassy had been giving, as exorbitant. Is that correct?

"Answer: That is correct.

"Question: It was well known in the market that Embassy was a discounter—price cutter?

"Answer: It certainly was."

The Court: Very well.

Mr. Saunders: The portion commencing where we just left off, Your Honor, "On December 16, 1954"—

The Court: Yes.

Mr. Saunders: And after Your Honor has read that, I will offer the document referred to. This continues over to page 157, ending on page 157 just before my name is inserted and ending "distributor in the market."

(Excerpt appears on side folios 932 and 933.)

The Court: Very well.

Mr. Saunders: I offer, now, as Government's Exhibit for identification No. 41, exchange of correspondence between F. D. Menken and William B. Hooper.

The Court: It is admitted in evidence.

(Thereupon, correspondence between F. D. Menken and W. B. Hooper was marked Government's Exhibit 41 for identification and received in evidence.)

[fol. 932] (The excerpt of deposition referred to in the middle of page 249, is as follows:)

"Question: On December 16, 1954, in writing to a Mr. Menken, did you not indicate that money which the Association was losing at Embassy was the result of exorbitant discounts which you inherited when you took Embassy and in which you made considerable progress in adjusting these prices, 'which are much too heavy and will require a great deal more work'?

"Answer: Yes.

"Mr. Saunders: I would like to have marked for identification docket numbered 401022, which came from the Association's file on a memorandum, F. D. Menken, dated December 16, 1954.

"(Thereupon, the above mentioned document was marked Government Exhibit No. 13 for identification, Witness Hooper, and retained by the Association.)

"The Witness: I might state that is a worthy objective that we are still working toward, but have not achieved.

"Question: The objective of eliminating the discount you inherited from Embassy?

"Answer: It sure is.

"Question: Embassy is not the only dealer in the market who gives discounts, is it?

"Answer: It certainly is not, and if it was, there would be no discounts. The only reason Embassy gives discounts is because they have to, to meet competition.

[fol. 933] "Question: At the time you acquired Embassy, was not Embassy more prone to give discounts than the other dealers?

"Answer: I would say yes, Embassy discount basis was probably the most liberal of any distributor in the market."

[fol. 934] The Court: I notice there is a reference in that exhibit that was just introduced to "two hungry independent dairies." Will there be proof or will it be stipulated which dairies those are?

Mr. Saunders: We think we will introduce proof. The name of one has already been mentioned in a previous document, Wakefield Dairy.

The Court: In other words, the Government contends that Wakefield is one of them. What is the Government's contention as to which is the other?

Mr. Saunders: At this date, I believe I will have to state that I believe Mr. Hooper was referring to Harvey Dairy.

The Court: Of course, Harvey Dairy does not enter into this.

Mr. Saunders: I offer at this time the portion of Mr. Hooper's deposition which appears on page 456, consisting of two questions and two responses.

The Court: You may read them.

Mr. Saunders: (Reading):

"Mr. Waters: Mr. Hooper, you said this Association seldom takes the lead in industry matters. Is that a self-imposed restraint?

"The Witness: Self-imposed?

[fol. 935] "Mr. Waters: Yes.

"The Witness: In a way, yes. My instructions to Embassy is that I want them to go along and sell their products without starting a lot of innovations in the market and on that basis, I would say self-imposed."

The next portion of Mr. Hooper's testimony answers the question of Your Honor, two questions and responses at page 127.

"Question: You told the Baltimore officials in this period—"

that was referring to the period of the acquisition—

"that your principal competition was coming from Wakefield Dairy, did you not?

"Answer: At that time, it was.

"Question: That you had to cut prices more than you wanted in order to meet Wakefield?

"Answer: We had to issue documents to meet Wakefield, otherwise we would not have had any business."

I offer in evidence Government's Exhibit, for identification, No. 42, a memorandum of September 9, 1954.

I might point out this answers the question raised by Your Honor during my opening argument whether the [fol. 936] Embassy acquisition resulted in an increase to the housewife, Your Honor, and I direct your attention to the last sentence on the page.

The Court: It may be admitted.

(Thereupon, memorandum dated Sept. 9, 1954 was marked Government's Exhibit No. 42, for identification, and received in evidence.)

The Court: Which sentence does your remark refer to?

Mr. Saunders: The sentence that is next to the last line:

"Effective Monday, September 6th, the price of Green Valley milk, which amounts to about 10,000 quarts per day, was increased one-half cent and discount taken off."

The Court: Of course, I am not sure whether that means an increase to the housewife or to the dealer.

Mr. Saunders: Embassy was the dealer.

The Court: Did it sell to retail stores or ultimate consumers?

Mr. Bergson: Green Valley milk?

The Court: The Court's question was whether Embassy sold to dealers, retailer or jobber, or was it a dealer selling to the ultimate consumer?

[fol. 937] Mr. Bergson: Both, but I think the evidence will show that Spring Valley milk was sold only to stores.

The Court: You have already shown that by the cross examination.

Mr. Bergson: I do not think I have, Your Honor, no. Green Valley milk was so-called economy brand milk.

The Court: No. You have shown Green Spring Dairy, Inc., owned and controlled by Embassy Dairy and that was the testimony of Mr. Ward, was it not?

Mr. Bergson: Yes, that is true.

Green Valley is a brand-name that the Association bought along with the assets of Embassy and it related to economy brand milk which was sold only to the stores and not to the ultimate consumer.

The Court: Very well.

Mr. Saunders: I offer Government's Exhibit, for identification, No. 43, a memorandum of December 1, 1954.

The Court: It will be admitted.

(Thereupon, document dated Dec. 1, 1954, was marked Government's Exhibit No. 43, for identification and received in evidence.)

The Court: It does not indicate who the memorandum was from, does it?

Mr. Saunders: This is a memorandum and all I can say, [fol. 938] Your Honor—I cannot testify—it is on Mr. Hooper's typewriter.

Mr. Bergson: We will concede that Mr. Hooper wrote the memorandum and it is from the Association's files.

The Court: Very well.

Mr. Saunders: I offer in evidence Government's Exhibit, for identification, No. 44, a memorandum of February 18, 1955.

The Court: What number was that?

Mr. Saunders: Number 44, Your Honor.

The Court: Thank you. It may be admitted.

(Thereupon, memorandum dated February 18, 1955, was marked Government's Exhibit No. 44, for identification, and received in evidence.)

Mr. Saunders: At this time, I would like to call to the stand Mr. E. C. Clifford.

Thereupon, E. C. CLIFFORD was called as a witness and, having been first duly sworn, was examined and testified as follows:

Mr. Saunders: Your Honor, we are lacking a document which is in the Courthouse. I wonder if we could postpone examining this witness and get the document during the recess?

[fol. 939] The Court: Yes, and you may proceed with something else.

Mr. Saunders: I offer Defendant's Admission No. 697.

The Court: Very well.

Mr. Saunders: I might point out, Your Honor, that May 26, 1954, was the date of the acquisition agreement which is in evidence.

I offer Defendant's Admission No. 10.

The Court: Very well.

Mr. Saunders: I offer Government's Exhibit, for identification, No. 50. The last page is marked, Your Honor.

The Court: It may be admitted.

(Thereupon, document marked Government's Exhibit No. 50, for identification, was received in evidence.)

Mr. Saunders: A method might be adopted here, Your Honor, which would save a lot of time. In the documents which were marked this morning as Government's Exhibit, for identification, No. 73, that is the payment vouchers for the former Embassy Dairy shippers, they are arranged by month and by name. If the defendant is willing to stipulate or concede that Mr. Bispham of Remington, Virginia, was such a producer for Embassy Dairy in January, 1954, a [fol. 940] document which I have before us may save time.

Mr. Bergson: I will stipulate that Mr. Bispham was an Embassy shipper in January of 1954, but that he was not an Embassy shipper in May of 1954.

Mr. Saunders: Will you stipulate he was an Embassy shipper in 1954?

Mr. Bergson: Yes.

The Court: Gentlemen, I am not going to follow the careers of hundreds of individual shippers.

Mr. Saunders: We are not asking you to do that, Your Honor.

The Court: I know, but when you start with one individual, how many more are you going to have?

Mr. Saunders: We have got this admitted except for this one.

The Court: What did you say?

Mr. Bergson: Mr. Bispham's name is not on the document that is in evidence containing a list of Embassy shippers. Is that correct?

The Court: Gentlemen, "de minimis non curat lex," let us leave out one shipper. It is not going to affect the case one iota either for or against the Government or the defendant.

Mr. Saunders: I offer Government's Exhibit, for identi- [fol. 941] fication, No. 49. This is the gentleman as to whom the stipulations were just made, Your Honor.

Mr. Bergson: I subscribe to the doctrine of de minimis, Your Honor, and I do not know the relevancy of this document. I will concede that it is a document that came from the files of the Association.

The Court: I am going to exclude that because we are getting into a morass with all these details. You know, Mr. Saunders, I do not want to lose sight of the forest for the trees.

Mr. Saunders: May I indicate the relevancy, Your Honor?

The Court: No. I will exclude that. I am not going to be bothered with one individual shipper.

Mr. Saunders: This indicates the matter of intent, Your Honor.

The Court: You do not have to prove intent in Section 7 of the Clayton Act.

Mr. Saunders: The Government believes, and I submit, that this is highly probative of what the likely effects will be.

The Court: I am not going to take testimony as to what was the intent of every individual shipper. I have ruled. Do not argue with the Court. Present your argument to [fol. 942] the Court and when the Court rules that ends it.

Mr. Saunders: I am still awaiting that document, Your Honor.

Is it possible to take the afternoon recess at this time?

The Court: We will take our mid-afternoon recess at this time.

(Thereupon, at 2:55 o'clock p.m., a brief recess was taken.)

[fol. 943] The Court: You may proceed.

Mr. Saunders: I offer in evidence Plaintiff's Exhibit for identification No. 45, which is the defendant's balance sheet as of December 31st, 1954.

The Court: It may be admitted.

(Government's Exhibit No. 45 for identification was received in evidence.)

Mr. Bergson: That is not one you mentioned last night. May I see it?

(The exhibit was handed to Mr. Bergson.)

Mr. Saunders: I call the Court's attention to the two entries under "Intangible Assets".

The Court: Yes, I noticed that.

Mr. Saunders: I call Mr. E. C. Clifford to the stand, please.

Thereupon, ERNEST C. CLIFFORD was called on behalf of the Government, and having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Saunders:

Q. Mr. Clifford, I show you now Plaintiff's Exhibit—

The Court: You have not identified his name yet for the record.

[fol. 944] Mr. Saunders: I'm sorry.

By Mr. Saunders:

Q. Would you please state your full name?

A. Ernest C. Clifford.

Q. What is your profession or occupation?

A. Certified Public Accountant.

Q. With what firm are you connected?

A. I am a partner in the firm of Wayne Kendrick and Company.

Mr. Bergson: I would like to be permitted to look over somebody's shoulder while this examination of this document is going on.

The Court: If Mr. Saunders has no objection, you may do so, of course.

You may proceed.

By Mr. Saunders:

Q. Is the firm of Wayne Kendrick and Company the certified public accounting firm which has as a client the Maryland and Virginia Milk Producers Association?

A. That is right.

Q. Have you personally prepared or supervised the preparation of profit and loss statements and other financial

statements for the Maryland and Virginia Milk Producers Association?

[fol. 945] A. Supervised.

The Court: I think these documents ought to be stipulated. I do not want to hear identification of documents unnecessarily.

Mr. Saunders: It is in evidence, your Honor.

The Court: Then what do you want to ask this witness about?

Mr. Saunders: I want him to explain two entries on it, your Honor.

The Court: I see. Very well. I thought you were about to have him identify the documents.

By Mr. Saunders:

Q. Mr. Clifford, did you supervise the preparation of Plaintiff's Exhibit No. 45?

A. I did, yes.

Q. Directing your attention now to the heading "Intangible Assets" and directing your attention to the entry "Unamortized Case of Non-Competitive Agreement—$958,333.33," would you state what that entry represents?

A. That represents the value estimated—the estimated value of the milk routes and gallonage purchases from Embassy Dairy, for which the sellers, Embassy Dairy, agreed not to compete in the market. In other words, the amount of milk that would be sold from Embassy Dairy without the old Embassy Dairy coming into the picture.

[fol. 946] I think that is a clear statement of it as I can give.

Q. When you enter or—does that represent the original amount of the unamortized cost?

A. It does not. The original amount was a million dollars, I am pretty sure.

The Court: Well, then, is this the cost or the value?

The Witness: It is the estimated value of that agreement.

By Mr. Saunders:

Q. In addition to that, there is an entry, is there not, "Good Will Purchased"?

A. That's right.

Q. What does that represent?

A. When the Dairy was originally purchased, the assets were appraised and the price was paid. That would be the difference between the price paid and the value of the assets—

The Court: In other words, this does not mean that this is the real value of the good will, does it?

The Witness: No, sir, it does not. It is a balancing figure between the value of the assets and the price paid.

The Court: Well, if that is so, then could one really tell from this balance sheet what the status of the company is, of the Association is? If you have an asset of $530,000, [fol. 947] which may be way overvalued, do you have a true balance sheet?

The Witness: In a balance sheet where you see that figure good will, sometimes it is a dollar, sometimes it is a million dollars, it doesn't have any value as far as saying the company is worth so much, because no one knows what good will is worth. It is a figure.

And in the case of a purchase, it is, nine times out of ten, the difference between what you pay for it and what you think the physical assets are actually worth.

The Court: Of course, I am not going to try the merits of bookkeeping or accounting, but as a layman that is one of the difficulties I find in reading balance sheets: you cannot tell how faithfully this reflects the real net worth of a company.

The Witness: You can't, no, sir. That is a fact.

The Court: Very well.

By Mr. Saunders:

Q. By whom was the valuation of one million dollars arrived at for the entry "Unamortized Cost"?

The Court: Does that affect the issues of this case?

Mr. Saunders: We think it does.

The Court: How?

Mr. Saunders: The relevance we think is this: that the Association placed a total valuation of one and a half [fol. 948] million dollars upon intangible assets. That represented not by routes themselves—

The Court: We have that already. Let's not have repetitious evidence on the same point.

Mr. Saunders: May I ask him this one question and I am through.

By Mr. Saunders:

Q. By whom was the valuation of one million dollars arrived at, Mr. Clifford?

A. As I remember it now; this was over four years ago, the question came up—

The Court: No. The question calls for a name. If you do not know, say so; if you do, give the name.

The Witness: I cannot say for sure.

The Court: Very well.

The Witness: I cannot say for sure who arrived at it.

By Mr. Saunders:

Q. Did you arrive at it, Mr. Clifford?

A. I did not.

Q. Did an Association employee—

The Court: We are not going to pursue the subject any more because I think we have enough on it. This is repetitious. We have Mr. Hooper's statements to the effect that they paid more than the assets were worth in order to get [fol. 949] rid of Embassy. In substance that is what he says in some of these memoranda.

Mr. Saunders: I have no further questions, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Saunders: I call Mr. George Midkiff to the stand, please.

Thereupon, GEORGE L. MIDKIFF was called on behalf of the Government, and having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Saunders:

Q. Would you please state your full name?

A. George L. Midkiff.

Q. Would you please state your profession or occupation?

A. I am a Special Agent in the Federal Bureau of Investigation.

Q. Mr. Midkiff, showing you Plaintiff's Exhibit for identification Nos. 75, 76, 77, and 78, which have been identified as the financial statements of Embassy Dairy, Inc., I ask you, sir, if you have made a study and any analysis of those financial statements.

[fol. 950] A. Based on these financial statements, I have computed certain—

The Court: Just a moment. The question calls for a yes or no answer.

The Witness: Yes.

By Mr. Saunders:

Q. Would you state what analysis you have made of these financial statements?

A. I made a comparison of net worth—

The Court: I suggest you speak a little louder so we can all hear you.

The Witness: I have made a comparison—

The Court: Don't look towards the wall. Your voice goes the other way.

The Witness: I have made a comparison of net worth to net income before and after taxes.

The Court: Before and after what?

The Witness: Before and after taxes, income taxes.

By Mr. Saunders:

Q. Did you take into account net operating profit?
A. Yes, from their profit and loss statements—

The Court: Just answer yes or no.
The Witness: Yes.

[fol. 951] By Mr. Saunders:

Q. Did you make any comparison of net operating profit to net worth or net sales?
A. No.
Q. Perhaps you misunderstood my question, Mr. Midkiff. Did you make any comparison of net operating profit to net worth and net sales?
A. Yes, from profit and loss statements, yes.
Q. Would you please state for the Court what your comparison showed?

Mr. Bergson: I object, your Honor. I don't see the relevancy of this.
The Court: I am going to take it. Objection overruled.

By Mr. Saunders:

Q. Take the year 1952, Mr. Midkiff.
A. With reference to the year 1952, the net worth of the corporation was $1,009,497.10.
The net income before taxes for that same period was $41,610.96.
For a ratio of 4.12 per cent.
The net income after taxes was $24,927.97, or a ratio of net worth to net income after taxes of 2.46 per cent.

The Court: That was the net income of the defendant?
[fol. 952] Mr. Saunders: Embassy Dairy, Inc., your Honor.
The Court: I beg your pardon.

By Mr. Saunders:

Q. What do your figures show with respect to the year 1953?
A. The net worth of the corporation for the year 1953, $1,034,481.54.

Q. What was the—would you compare net income with net worth before and after taxes for each year?

A. Net income before taxes, $156,661.19. A ratio of 15.14 per cent.

Net income after taxes, $76,579.69, or a ratio of net worth to net income after taxes of 7.40 per cent.

Q. What do the figures show for 1954?

A. 1954 we show net income as $1,112,030.72.

Net income before taxes, $38,332.50, or a ratio of 3.44 per cent.

We show net income after taxes of $21,132.50, or a ratio of net worth to net income after taxes of 1.90 per cent.

Q. What was the three-year average of net income after taxes?

A. Averaging the three—

Q. The average ratio.

A. Averaging the three years' net worth, we have $1,052,-[fol. 953] 003.15 or a ratio of that net worth, the average net worth, to the average net income before taxes of 7.49 per cent.

The net income, the average, for the three-year period, net income after taxes $40,880.08 or a ratio of net worth, the average net worth for the three years to the average of net income after taxes for the three years of 3.88 per cent.

Q. Did you make a comparison of sales to profits, Mr. Midkiff?

A. I did.

Q. Do you know or could you give us the figures for the respective years 1952, 1953 and 1954?

A. 1952, the company had net sales of $6,055,616.72. On those sales it had net operating profit of $65,924.20, or a ratio of sales to net operating profit of 1.08 per cent.

They had net income before taxes in the year 1952 of $41,610.96. Or a ratio of sales to net income before taxes of 0.68 per cent.

They had net income after taxes of $24,927.97 or a ratio of sales to net income after taxes of 0.41 per cent.

The Court: I would like to inquire what is the relevancy of all these figures?

Mr. Saunders: Your Honor, this is to show the relative [fol. 954] profitability of Embassy's Dairy immediately prior to its acquisition by the defendant.

The Court: What inference do you draw from it?

Mr. Saunders: We think the inference from the data which Mr. Midkiff has and will testify to is, as compared to the price that was paid for Embassy Dairy and to post acquisition data evidence which will be offered through the same witness, that the Association paid far more than the business was worth.

The Court: I know but I won't take any evidence on that point because Mr. Hooper admitted that they did it. That is enough. You are just piling up cumulative repetitious evidence.

Mr. Saunders: Your Honor, I am satisfied to stop at this point and we will proceed to the next matter of business.

By Mr. Saunders:

Q. Mr. Midkiff, have you made an analysis of the profit and loss statements of Embassy Dairy Division covering the period from August, 1954 to March, 1957?

A. I have.

Mr. Saunders: I ask that statement of profit and loss of the Embassy Dairy Division, which have been authenti- [fol. 955] cated, be marked as Plaintiff's Exhibit No. 82, No. 83—

The Court: You mean you are offering them in evidence?

Mr. Saunders: I am just identifying them. They have not been given a number.

The Court: Are you going to offer them in evidence?

Mr. Saunders: No, your Honor.

The Court: Then why do you want to identify them?

Mr. Saunders: So the record may, refer to them for the record. I will offer them in evidence surely.

The Court: No, I do not want to see the record encumbered.

Mr. Saunders: They are on the list of documents but they are not included in the record here.

The Court: I see. Very well.

(Government exhibits 82, 83, 84 and 85 are marked for identification.)

By Mr. Saunders:

Q. Showing you now Mr. Midkiff, statements of profit and loss of Embassy Dairy Division which have been numbered government exhibits for identification 82 through [fol. 956] 85, was your study based on those records, those documents?

A. It was.

Q. Would you please state for the Court the net sales, the operating expenses, and the net operating profit or loss of Embassy Dairy Division for the accounting periods since the date of the acquisition?

A. Plaintiffs exhibit 82 covers the period August 1, 1954 through December 31, 1954, and during that period they had net sales of $2,449,667.89. Operating expenses were $2,838,209.40, giving a net operating loss of $388,541.51.

Q. Would you take the data for the year 1955 and state your calculation?

A. 1955 was a full year. They had sales of $5,741,243.70. Operating expenses, $6,303,996.19. A net operating loss, $562,752.49.

Q. What are the figures for the full year 1956?

A. They have net sales of $5,735,429.20. Operating expenses $6,148,172.19. Net operating loss of $412,742.99.

Q. Do you have data for the year 1957?

A. I have data for the period January 1, 1957 to March 31, 1957.

[fol. 957] Q. What does that show?

A. That shows net sales, $1,707,941.80. Operating expenses of $1,757,129.86. For a net operating loss of $49,188.78.

The Court: What inference do you seek to have the Court draw from these figures, Mr. Saunders?

Mr. Saunders: That prior to the operation Embassy Dairy, Inc., the way it did business, your Honor, was at least very moderately, fairly moderately successful, profitable. The defendant took it over and the defendant has run the dairy based upon its pricing, and the defendants own

division has been operating at a substantial loss, approximately—well, in one year $562,000.

The Court: Very well.

Mr. Saunders: I offer in evidence the two schedules prepared by Mr. Midkiff as plaintiffs' exhibits 86 and 87.

The Court: They may be admitted.

(Government exhibits 86 and 87 are received in evidence.)

Mr. Saunders: For the record, the exhibit entitled "Ratio of Net Income Before and After Taxes and of Net Operating Profit to Net Worth and net Sales of Embassy Dairy, Inc., 1952 to 1954" will be marked as Government exhibit [fol. 958] 86 while the schedule "Maryland and Virginia Milk Producers Association, Inc., Embassy Dairy Division, Profit and Loss Statement Data" will be Plaintiffs Exhibit 87.

Cross examination.

By Mr. Bergson:

Q. Mr. Midkiff, in compiling the data on the operation of the Embassy Dairy Division, did you take into account the fact that the Association moved from 16 to 18 thousand gallons of milk from the Class III price of $3 into the Class I price of $6.62?

A. No.

The Court: I want to say, Mr. Bergson, that frankly, I do not think it is going to affect this Court's decision as to whether the Embassy Dairy Division was operated at a profit or at a loss.

Mr. Bergson: I do not think it should, your Honor.

The Court: So far as this Court is concerned. Now, if you want these questions answered for the purposes of the record, you may ask them.

Mr. Bergson: Your Honor, I will not pursue this line of questioning. I think that is sufficient.

[fol. 959] By Mr. Bergson:

Q. Now, in compiling your profit and loss statements for Embassy Dairy, Inc. and making your comparison be-

tween the net worth or the ratio between the net worth and the net income, did you take into account the fact that the Maryland and Virginia Milk Producers Association, when they acquired Embassy Dairy, acquired only the assets and not the liabilities of Embassy Dairy, Inc.?

A. The figures that I have here were prior to the acquisition.

Q. And they include all of the liabilities of Embassy Dairy, Inc.?

A. The items included in the net worth there are the preferred stock, the common stock and the earned surplus.

Q. And it is a subtraction of the assets from the liabilities?

A. Those would equal—

Q. I beg your pardon?

A. They would equal.

Q. And when the Association purchased the assets of Embassy Dairy, Inc., it did not purchase the liabilities from which the assets had been subtracted upon which you arrived at the net worth figure?

[fol. 960] The Court: You mean, did not assume the liabilities?

Mr. Bergson: Did not assume the liabilities.

The Witness: I understand that it did not.

By Mr. Bergson:

Q. So that the figures that you have compiled in effect are largely meaningless?

The Court: Well, that is a conclusion. You can argue that. I would not ask a witness to admit that. I told you, Mr. Bergson, that I think the way these figures develop, they are not going to have any effect on the decision for or against the Government or for or against the Defendant because I do not see that they are relevant.

I admitted them because I did not know what they were going to develop.

Mr. Bergson: May I just ask two more questions?

The Court: Yes.

Mr. Bergson: I do not want to trespass unduly on your Honor's time.

The Court: You have a right to cross examination once the testimony has gone in.

Mr. Bergson: I agree 100 per cent with your Honor's position but I do think I ought to make a record.

[fol. 961] The Court: Yes. I feel like striking out the testimony so there will not be any record but—there is such a thing as throwing too many details into a case.

Mr. Bergson: I will ask two more questions.

The Court: Yes.

By Mr. Bergson:

Q. Do the figures for 1954 take into account that Embassy Dairy, Inc. operated the Embassy Dairy for only seven months?

The Court: Just answer yes or no.

The Witness: Might I inquire which statement you are referring to there?

By Mr. Bergson:

Q. The statement entitled "Ratio of Net Worth Income Before and After Taxes."

A. That ratio is computed based on the statement which ends in the fiscal year September 30, 1954.

Q. Now, the assets were transferred on July 26, 1954?

A. I am not aware of that date.

The Court: It makes no difference, Mr. Bergson, whether the ratio is taken for a whole year or for one month. The [fol. 962] ratio is a ratio as between the two figures. So long as both figures are taken from the same period.

Mr. Bergson: But when you compare the figures, your Honor, with annual figures and then you compare them with a period—

The Court: I think that speaks for itself.

Mr. Bergson: May I ask just one more question?

The Court: Yes.

By Mr. Bergson:

Q. Are you aware that a farmers cooperative does not pay income tax, Federal income tax?

A. I have no personal knowledge of that, no.

The Court: Anything further?
Mr. Saunders: No, sir.
The Court: You may step down.

(Witness excused.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: I think we are going to recess for the day. But I want to ask you this: Are you ready to rest your case?

Mr. Saunders: I think we should conclude our case tomorrow, depending upon one thing, your Honor.

The Court: By what time tomorrow?

Mr. Saunders: By noon, I would guess, your Honor.

[fol. 963] The Court: No, I think you are about through. You may not know it, but you are about through. Do not misunderstand me. I think you have got enough to make a prima facie case. I mean through in that sense.

Mr. Saunders: I hope it is in that sense, your Honor.

The Court: You have got a prima facie case, already. Now, it may be that it will be disproved by the other side.

Mr. Saunders: May I explain the situation? I am perfectly happy to tell your Honor the schedule, what it seems to be. We have just a few more documents and then we are going to have a government economist, possibly a few other witnesses, but our problem is on documents and if we can work that out with the defendant, then we are just about through.

The Court: Well, so far as documents are concerned, that should be no problem.

Mr. Saunders: I hope it will not be. Then, as I say, we have a government economist coming in to testify on the necessary data on sales.

The Court: Tell him to be brief. Economists, who are very erudite, sometimes have a way of being expansive.

Mr. Saunders: He will come right to the point.

[fol. 964] Mr. Bergson: May I raise one problem, your Honor? This abrupt termination comes as somewhat of a surprise to us because Mr. Saunders had indicated that he was going to take a little longer to try this case. If we are going to spend time authenticating documents tonight and

have to go on with our affirmative case right after he closes tomorrow, we are going to be in trouble.

The Court: You have a staff of several people. Let one of your assistants do the authenticating of documents. I do not want to be misunderstood. When I said that you are about through, I meant by that that I think you have established a prima facie case. So that you do not need much more for a prima facie case.

Mr. Saunders: I understand, your Honor.

The Court: This is so far as Embassy is concerned. I am not so sure about Richfield and I do not know whether you are going to press the Richfield transaction.

Mr. Saunders: Yes, your Honor, we will prove the effects and as I say—I was seriously expecting we could wind this up tomorrow. I meant that.

The Court: Try to wind it up in about an hour's time tomorrow.

Mr. Bergson: May I clarify something that was in the record of the day before yesterday? I was under the im-
[fol. 965] pression that Mr. Saunders conceded that Embassy—I mean Richfield-Wakefield was in failing condition at the time we acquired it.

The Court: That is correct. Didn't you? But he said that that did not meet the problem because they contended that the failing condition was caused by the actions of the defendant. Was that your position?

Mr. Saunders: That is our position, your Honor.

Mr. Bergson: My only question is, do we have to offer any proof as to the failing condition at this time?

Mr. Saunders: I think, your Honor, that the government is not willing to concede—we have admitted certain financial statements. We have authenticated them. But I think that is a burden that is upon the defendant.

The Court: Yes. I want to say this: I think I ought to warn you, Mr. Saunders: I am not sure that you made out a prima facie case as yet as to Richfield. I think you have a prima facie case probably as to the Wakefield transaction.

Mr. Bergson: As to Wakefield?

The Court: Yes. Because some of the statements introduced today indicated that Wakefield was underselling and

[fol. 966] they considered Wakefield a troublesome factor, from their standpoint.

Mr. Bergson: But under the failing corporation doctrine, your Honor.

The Court: I am referring to the prima facie case of the Government. Failing-corporation doctrine is a defense.

Mr. Bergson: Right. I concede that.

The Court: On the prima facie case to withstand a motion to dismiss. You had better check your proof as to Richfield. I am not sure that you have established a prima facie case as to Richfield but I think you have as to Embassy and Wakefield. It may be you will want to abandon Richfield. I do not know. I am not suggesting that you do.

Mr. Saunders: I am not abandoning it, your Honor.

The Court: Well, you had better check on your evidence on Richfield or have someone do it for you because I am not sure—I may be mistaken, you may be able to call my attention to some matters that establish a prima facie case—but the way I saw the evidence develop, I am not sure that you have a prima facie case as to the Richfield transaction.

Mr. Saunders: I understand, your Honor. Thank you. [fol. 967] The Court: Of course the biggest item in this is the Embassy transaction.

Mr. Saunders: That is the big item.

The Court: That is the big item and that is what the Government is interested in. You have a prima facie case there. I dislike to see a case overtried after counsel makes his prima facie case. Of course it may be necessary for you to come back in rebuttal. It may be that the defense will demolish the prima facie case, but I will give you full opportunity for rebuttal.

Mr. Saunders: Thank you.

I have one or two documents which I would like to offer in evidence.

The Court: You can do that in the morning. We will recess at this time. We will recess the trial until 10 tomorrow morning.

(At 3:50 p. m. the trial was adjourned until 10 a. m., Thursday, November 13, 1958.)

[fol. 972] Mr. Saunders: I understand—and the defendant, I take it, will bear this out, your Honor—there is a

Plant Committee of the defendant's Board of Directors which supervises the operation of Embassy Dairy Division.

The Court: Very well. Let it be admitted.

(Government Exhibit No. 46 was received in evidence.)

Mr. Waters: I would like to call Mr. Paul Johnson to the stand, please.

Thereupon PAUL JOHNSON was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Waters:

Q. Please state your full name to the Court.
A. Paul G. Johnson.

The Court: You will have to speak so we can all hear you. What is your name?
The Witness: Paul G. Johnson.

By Mr. Waters:

Q. Mr. Johnson, are you employed by the Capital Milk Producers Association?
A. Yes, sir.
Q. In what capacity?
[fol. 973] A. Manager.
Q. Were you so employed in 1954?

The Court: Manager of what? Do not talk so rapidly. You talk faster than I can think. What concern is he connected with?
Mr. Waters: Capital Milk Producers Association.

By Mr. Waters:

Q. Were you so employed in 1954, Mr. Johnson?
A. Yes, sir.
Q. Where is the office of the Capital Milk Producers Association located?

A. In Frederick, Maryland.

Q. What type of organization is Capital Milk Producers Association?

A. It is a non-profit bargaining association.

The Court: Is it a cooperative?

The Witness: A cooperative milk bargaining association.

By Mr. Waters:

Q. Is the milk produced by your members sold in the Washington Metropolitan Area?

A. Yes, sir.

Q. Mr. Johnson, directing your attention to August, 1954, do you recall that Maryland and Virginia Milk Producers [fol. 974] Association acquired Embassy Dairy, Inc.?

A. Yes, sir.

Q. At that time, Mr. Johnson, did any of the former Embassy producers apply for membership in the Capital Milk Producers Association?

A. Yes, sir, some of them did.

Q. Was Capital Milk Producers Association in a position to take on any of these producers?

A. We took on a few of them, as many as we could handle.

Q. How many did you take on in 1954?

A. Eight to ten, as I recall.

Q. Would you explain why Capital Milk Producers Association was not in a position to take on milk of additional producers at this time?

The Court: He did not say they were not. He said they took on all that they could.

By Mr. Waters:

Q. Was Capital Milk Producers in a position to take all the milk of all such producers who applied?

The Court: Did they take on any more? Why do you not bring out whether they took on all those who applied?

By Mr. Waters:

[fol. 975] Q. Mr. Johnson, did you take on all the producers that applied for membership in the Capital Milk Producers Association?

A. No, sir.

Q. Would you explain why Capital was not in a position to take on milk of additional producers?

A. Any additional milk we took on would be surplus to our outlets and we had no facilities for handling that surplus.

Mr. Waters: Thank you, Mr. Johnson.

The Court: How many applicants did you refuse to accept?

The Witness: We had about, as I recall, approximately fifteen, and we were able to take on eight to ten.

The Court: Very well.

Cross examination.

By Mr. Bergson:

Q. Mr. Johnson, you said you took on eight to ten producers at that time?

A. Yes, sir.

Q. I ask you whether you took on Mr. Ecker as a producer at that time?

A. Mr.—

[fol. 976] Q. Ecker?

A. Paul Ecker?

Q. E-c-k-e-r.

A. We took on a Paul Ecker at that time. My field man brought his signed contract into the office, yes, sir.

Q. Mr. Esworthy?

A. Yes, sir.

Q. Mr. Flanagan?

A. I don't know. I don't recall that name.

Q. Mr. Geisbert?

A. What was the first name?

Q. I do not know.

A. There are several Geisberts in that area.

Q. Did you take on a Geisbert at that time?

A. We took on a Geisbert.

Q. A Himes?

A. Not right at that time. Later on.

Q. Prior to December 31, 1954?

A. Possibly so but not in August when the original applications were made.

Q. Mr. Hoffman?

A. Mr. Hoffman, Senior, yes.

Q. Mr. Kemp?

[fol. 977] A. Yes, sir.

Q. Mr. Renn, R-e-n-n?

A. Yes, sir.

Q. Mr. Shook?

A. Yes, sir.

Q. Mr. Smith?

A. We have several Smiths and I do not recall that for sure.

Q. C. T. Smith?

A. C. T. Smith is a member.

Q. M. E. Smith?

A. Yes, sir.

Q. Mr. Stunkle?

A. Mr. Stunkle?

Q. Stunkle.

A. Mr. Stunkle had been a member and he came back at some time. Whether it was right at that time, I couldn't answer.

Q. Prior to December 31, 1954?

A. I have to check my records, sir.

Mr. Bergson: Your Honor, the Government has admitted that this producer joined Capital Milk Producers Association prior to December 31, 1954.

The Court: They admitted what?

[fol. 978] Mr. Bergson: The Government has admitted as a fact. And I will offer that admission.

The Court: I am not sure of what fact they admitted.

Mr. Bergson: That Mr. Stunkle became a member of Capital Milk Producers Association.

The Court: I see.

Mr. Saunders: Your Honor, everything concerning what has happened to these producers has been admitted. I don't want to interfere with Mr. Bergson's cross examination unduly but, in so far as what Mr. Johnson would testify to is consistent with the admissions, they are admitted and there is no question about them.

By Mr. Bergson:

Q. Mr. Summers?

A. Yes, sir.

Q. Isn't it a fact, Mr. Johnson, that Capital Milk Producers Association took on 13, rather than 8 to 10, of the ex-Embassy shippers?

A. I wouldn't be able to answer that without going to my records but some of those shippers were not taken on right at that particular time but were taken on later in the year. We did not take on all of the shippers who applied in late July and early August in 1954. We were not able to take [fol. 979] on all of them.

Q. Now, didn't you testify when your deposition was being taken on October 17, 1958, that you contacted some of the Embassy shippers, several of them, and you found that some of them had been contracted for prior to that time and that you couldn't get them?

A. That is true. We were given names by some of our members. These people had talked to our members or our president and asked us to contact these people. And we made those contacts.

Q. So you were out looking for producers at that time?

A. We were looking for a certain number; that is right, which we took on.

Mr. Bergson: May I have your Honor's indulgence for a moment?

The Court: Surely. Take whatever time you need.

(A short pause.)

By Mr. Bergson:

Q. Mr. Johnson, to whom does Capital Milk Producers ship its milk?

A. That milk is going to High's Dairy Products in Washington.

[fol. 980] The Court: To whom?

The Witness: High's Dairy Products.

By Mr. Bergson:

Q. Does it all go to High's Dairy Products?

A. Yes, sir.

Q. Has that always been the case?

A. No, sir.

Q. To what other dairies did Capital Milk Producers Association ship its milk?

Mr. Waters: I object, your Honor. This is beyond the scope of the direct examination.

The Court: I think that is within the scope of the direct examination because you brought out, Mr. Waters, that Capital Milk Producers Association sells milk in the Washington market. So this is within the scope of the direct examination.

You may answer.

The Witness: We sold for a period to Wakefield Model Farms Dairy.

By Mr. Bergson:

Q. What period was that?

A. From 1950 to 1955, I believe.

Q. And why did you cease shipping to Wakefield Model Farms?

[fol. 981] A. We were having a little difficulty in our financial transactions with them and, at the expiration of our contract year in 1955, we gave them notice.

Q. You mean you refused to ship to Wakefield Dairy in 1955 because they weren't meeting their financial obligations?

Mr. Waters: I object, your Honor. It definitely is beyond the scope—

The Court: I think this is within the scope of the direct examination.

By Mr. Bergson:

Q. Is that correct?

The Court: You may answer.
The Witness: That is right.
Mr. Bergson: No further questions, your Honor.

Redirect examination.

By Mr. Waters:

Q. Mr. Johnson, how many former Embassy producers did you take on in August, 1954?

The Court: I do not understand. You must speak up a little more distinctly. Will you repeat your question?

By Mr. Waters:

Q. Mr. Johnson, how many former Embassy producers [fol. 982] did you take on in August, 1954?

A. As I answered before—

The Court: Just a moment. He has already answered the question on direct examination. He said eight to ten. There is no use asking him to repeat it on redirect.

Mr. Waters: That is all.

The Court: You may step down.

(Witness excused.)

OFFERS IN EVIDENCE

Mr. Saunders: Bearing in mind your Honor's admonition of yesterday, I would like to hand up to the clerk and then to the Court what has been marked as Government's Exhibit No. 103 for identification, Your Honor, this is an offer of documents and some testimony of Mr. Hooper which is so akin to some of the offers made yesterday that I feel that I ought to apprise the Court and, as briefly as possible, indicate the type of documents and what they would be offered for.

The Court: Very well.

Mr. Saunders: I am sorry. That number should be 109. It has been incorrectly numbered on your Honor's copy.

The Court: This is numbered 103.

Mr. Saunders: It has been incorrectly numbered, your Honor. I am sorry, it should be 109.

[fol. 983] The Court: 109. Very well. You may proceed.

Mr. Saunders: I might point out, inadvertently I have already offered and your Honor has admitted Plaintiffs' Exhibit No. 46.

The Court: Well, what is in is in.

Mr. Saunders: That is right, your Honor.

I am offering at this time all other portions of Mr. Hooper's deposition referred to in this plaintiff's exhibit 109 for identification.

The Court: Any objection?

Mr. Bergson: This is the first I have seen of this, your Honor. It is kind of a staggering document.

The Court: Suppose you take a moment.

(A short pause.)

The Court: I want to say this, Mr. Saunders: I am disinclined to admit these documents. While, of course, they would not do any harm and I think, within reason, parties should be allowed to make their own record, the difficulty is, if I admit this evidence, the other side has a right to offer evidence to negative this. I consider that this evidence is irrelevant on the cause of action relating to Section 7 of the Clayton Act. I think it might be very relevant, indeed, to the other cause of action under the Sherman law. But I do not [fol. 984] think it is relevant on the cause of action under Section 7 of the Clayton Act.

Mr. Saunders: May I explain why we believe it is relevant, your Honor?

The Court: Yes.

Mr. Saunders: In t . Hamilton Benrus case, which is a Section 7 case, the fact hat the director of one corporation became a director of another, thus obtaining access to information of a competitor, was regarded as a factor bearing on the probable effects of the acquisition. The same thing happens here.

The Court: In any event, this is cumulative. You have already introduced some evidence showing that. So, I am going to exclude this, unless the other side consents.

Mr. Bergson: I do not consent, your Honor.

The Court: Very well. I am going to exclude this. Of course, I am not excluding your first item, Exhibit 46, because that has already been admitted.

Mr. Saunders: I offer in evidence Stipulation No. 13 between the parties which has been marked as plaintiff's Exhibit No. 110.

The Court: Let it be admitted.

(Government Exhibit No. 110 was received in evidence.)

[fol. 985] Mr. Saunders: I would like to direct your Honor's attention specifically to paragraph 2 by which it is agreed that the total quantity of fluid milk sold in the Washington metropolitan area by dealers referred to in paragraph 1, that is, those who are not located in the Washington metropolitan area, those selling from outside, during the period 1953 to 1957 has amounted to approximately 3 per cent of the total of all fluid milk sold in the Washington Metropolitan area.

I offer Stipulation between the parties No. 14 which has been marked as Plaintiffs' Exhibit for identification No. 111.

The Court: Let it be admitted.

(Government Exhibit No. 111 is admitted in evidence.)

Mr. Saunders: I would like to offer at this time stipulation No. 15 between the parties which has been marked as Plaintiffs exhibit for identification No. 106. Now with respect to this particular stipulation I should state for the record that there is a question with respect to the year 1956—1955, I am sorry—with respect to Richfield Dairy Corporation. There is a witness on call from the District of Columbia Government who would testify with respect to the other matters contained herein.

[fol. 986] He would also testify that in 1955 Richfield Dairy Corporation had a District of Columbia Health Department license or permit for the sale of fluid milk in the District of Columbia. If, upon further questioning of this gentleman—we are awaiting his appearance—it should develop that that permit was cancelled or relinquished, it will also be stated for the record, and that agreement has been made between counsel.

The Court: Very well. Let it be admitted.

(Government Exhibit No. 106 was received in evidence and was subsequently renumbered Government Exhibit No. 113 in evidence.)

Mr. Saunders: I offer at this time—May I have just a moment, your Honor?

The Court: Take whatever time you need.

(Brief pause.)

Mr. Saunders: Plaintiff's Exhibit for identification No. 112. I do not believe your Honor has a copy of this.

The Court: Very well.

Mr. Bergson: May I examine it—

The Court: Yes, indeed.

(Brief pause.)

Mr. Saunders: That document should be considered in conjunction with testimony of Mr. Hooper on deposition, which begins at page 798. The deposition testimony explains the document.

[fol. 987] The Court: What is this document?

Mr. Bergson: I object to this, your Honor, on the ground that it is just a bunch of disconnected notes that are completely meaningless.

The Court: This, apparently, I would guess is some notes that somebody made for the purpose of making a speech.

Mr. Saunders: Mr. Hooper so identifies it, your Honor, in his deposition. He states the speech was given, your Honor.

The Court: Yes, but these are just rough notes. I am going to sustain the objection.

We will take our usual mid-morning recess at this time.

(A brief recess was taken.)

The Court: You may proceed, gentlemen.

Mr. Saunders: I would like to state for the record that a little bit of confusion crept into the numbering before the recess, your Honor. I would like the record to show that the document referred to as Plaintiffs Exhibit 106 heretofore, should have been referred to as Plaintiffs Exhibit 113.

The Court: Very well.

Mr. Saunders: I offer into evidence plaintiff's Admis-
[fol. 988] sions Nos. 699 and 700.

The Court: Very well.

Mr. Saunders: 699 and 700, your Honor.

The Court: Yes.

Mr. Saunders: I would like to direct the Court's attention to the answer to paragraph 29 (A) of the Amended Complaint, in which the defendant admits that on December 6, 1957, it purchased all of the outstanding capital stock of Richfield Dairy Corporation, a District of Columbia corporation, and Simpson Brothers, Inc., trading as Wakefield Model Farms Dairy, a Delaware Corporation.

I offer at this time documents which have been marked as Plaintiff's Exhibits for identification Nos. 47 and 48, an exchange of correspondence between the Michigan Milk Producers Association and the Maryland and Virginia Milk Producers Association.

Mr. Bergson: No objection.

The Court: 47 and 48?

Mr. Saunders: 47 and 48, your Honor.

The Court: They may be admitted.

(Government's Exhibits 47 and 48 were received in evidence.)

[fol. 989] Mr. Saunders: At this time I would like to call Mr. Harry Bender to the stand, please.

Thereupon HARRY BENDER was called as a witness by counsel for the Government and, being duly sworn, was examined and testified as follows:

Direct examination.

Mr. Saunders: Mr. Bender has to pick up a few more papers in the witness room. I do not think he carried them in all at once.

The Court: Very well.

(Brief pause.)

The Court: I hope that you are not going to put all those papers in evidence.

Mr. Saunders: I intend to do so, your Honor. I think they are quite important.

The Court: Very well.

How long will this witness' testimony take?

Mr. Saunders: I would say no more than half an hour or forty-five minutes, your Honor, I hope, on direct.

The Court: I mean on the direct examination.

By Mr. Saunders:

Q. Mr. Bender, would you state your full name for the Court, please?

[fol. 990] A. Harry Bender.

Q. Would you state your profession or occupation and by whom you are employed.

A. I am employed as an economist in the Antitrust Division of the Department of Justice.

The Court: You are in a big room. You will have to speak louder. By whom are you employed? You can use the microphone, if you wish.

The Witness: Department of Justice.

By Mr. Saunders:

Q. Mr. Bender, have you prepared, in connection with the instant case, tables and charts indicating various statistical and economic data with respect to the Washington milk industry?

The Court: Before you do that, may I suggest that you identify the witness' capacity? He says he is employed by the Department of Justice.

By Mr. Saunders:

Q. In what capacity are you employed by the Department of Justice?

A. As an economist.

The Court: Very well.

By Mr. Saunders:

Q. How long have you been so employed?

[fol. 991] A. Eleven years.

The Court: Now you may proceed.

By Mr. Saunders:

Q. In connection with the instant case, Mr. Bender, have you prepared tables and charts indicating data concerning the Washington metropolitan milk industry prior to and subsequent to the Embassy acquisition?

A. Yes, sir.

Mr. Bergson: Your Honor, may I have the opportunity to cross examine this witness on his qualifications before he proceeds—

The Court: I never do that. That has to be part of your regular cross examination. However, in view of the fact that, judging from Mr. Bergson's statement, the witness' qualifications might possibly be questioned, you had better qualify him as an economist. Do you question the witness' qualifications?

Mr. Bergson: I don't question that he has been employed by the Department of Justice for ten or eleven years as an economist, but I would like, on cross-examination, to go into his background and his duties as an economist.

The Court: Well, suppose you qualify him. In other words, you do not concede his qualifications as an economist? You know, in order to shorten matters, when an expert [fol. 992] is put on the stand, I am generally in the habit of asking opposing counsel whether they concede the qualifications of the witness. If they say, yes, then I do not permit examining counsel to take time to qualify him. If they say no, then I—

Mr. Bergson: I don't have sufficient knowledge to satisfy myself as to whether or not he is qualified as an expert.

The Court: Then I think you had better qualify him.

Mr. Saunders: Of course, your Honor.

By Mr. Saunders:

Q. Mr. Bender, would you state your educational background?

A. I am a graduate—do I have to speak into the microphone?

The Court: The microphone is for your convenience. If you can speak loud enough without using it, you do not need to use it but just make yourself heard.

The Witness: I am a graduate of Wesleyan University. I have had a year's graduate work in economics and statistics. I have worked for eleven years in the Department of Justice as an economist. I worked for five years in the Office of Price Administration as an economist.

[fol. 993] I worked for one year in the Veterans Emergency Housing Administration as an economist. I have had occasional jobs with other governmental and state agencies as an economist. In all of these jobs I did considerable work in statistics as well as economics.

Q. Mr. Bender, have you, previous to your connection with this case, had any experience in analyzing or considering, from an economic standpoint, the milk industry in markets other than the Washington metropolitan area?

A. Yes, sir.

Q. Would you state in which other markets you have had occasion—

The Court: I think he is sufficiently qualified, Mr. Saunders.

By Mr. Saunders:

Q. In connection with the instant case, Mr. Bender, have you had occasion to make tables and charts which reflect analysis and study which you have made of the Washington metropolitan area milk industry both before and after the Embassy acquisition?

A. Yes, sir.

Q. Are the tables and charts that you have prepared the documents which have been marked for identification as plaintiff's exhibits 88 through 108, inclusive?

[fol. 994] A. Yes, sir.

Q. As briefly as you can, Mr. Bender, would you outline to the Court the tables and charts which you have prepared which have been marked as these exhibits and what they reflect?

A. Do I understand you want me to discuss all of them at this time?

Q. I think you should start with plaintiff's exhibit No. 88, Mr. Bender, and explain—

The Court: I think, perhaps it might be better and it would probably save time and make the testimony more pointed if you proceeded by question and answer.

Mr. Saunders: All right, your Honor.

The Court: Because then the Court would understand easier as to just what you are trying to attain by this testimony.

By Mr. Saunders:

Q. Mr. Bender, have you prepared a table reflecting the number of independent producers who supplied milk to Embassy Dairy, Inc., prior to the acquisition and the number of such producers who were supplying milk independently of the Association to the Washington metropolitan area milk market following the acquisition?

A. Yes, sir.

[fol. 995] Q. Would you identify the table by its exhibit number, please?

A. Plaintiff's Exhibit 88, and the accompanying chart, plaintiff's exhibit No. 89.

Q. Directing your attention to the chart which is, is it not, a picturization of the data contained in Plaintiff's Exhibit No. 88?

A. Yes, sir.

Q. The chart being plaintiff's Exhibit for identification No. 89. Would you explain to the Court what plaintiff's Exhibit No. 89 shows and, incidentally, Mr. Bender, have you brought enlarged charts with you?

A. Yes, sir.

Q. Would you care to use those?

A. Yes, sir.

The Court: Perhaps you can stand them on the blackboard, if you wish. I think you can use that as sort of an easel. Although, really, I have the enlargement before me and it is not necessary.

Mr. Saunders: Yes, your Honor, we provided that for your convenience. I feel terrible, after Mr. Bender has gone to all this trouble, in not having those charts used.

The Court: On second thought, I think they should be [fol. 996] used because opposing counsel have to follow the testimony, also.

(The witness went to the blackboard and testified from there.)

The Court: You may proceed, Mr. Bender.

The Witness: This chart shows the number of independent suppliers of Embassy Dairy—

The Court: I suggest, if you can possibly stand sideways, because if you face the blackboard, your voice travels the other way. Then you have to raise your voice because the reporter is on the other side of the courtroom and he has to record what you are saying. You are an economist. Just suppose you were delivering a lecture in economics to a college class; you would speak a good deal louder than you are doing now.

The Witness: These bars show the number of independent suppliers of milk who were shipping to Embassy Dairy, Inc., before the acquisition.

The bars on the righthand side of the acquisition line show the number of suppliers who were shipping milk to the Washington metropolitan area independently of the Association after the acquisition. It deals with the suppliers who were shipping milk to Embassy Dairy, Inc., as of May, 1954. Prior to the acquisition, as of May, 1954, [fol. 997] there were 123 independent suppliers shipping milk to Embassy Dairy, Inc. Immediately after the acquisition, as of September, 1954, there were fourteen independent suppliers shipping into the Washington metropolitan area, independently of the Association. That number increased to 17 for the better part of the following year and then there was a gradual increase in the number until it reached approximately 45 toward the end of 1956

where it has remained substantially—where it remained substantially until the end of 1957.

The Court: Mr. Bender, are you using the word "suppliers" as synonymous with "producers"?

The Witness: Yes, sir.

The Court: They mean the same thing. The word "producers" has been used right along in this trial and I want to make sure that you are using it in the same concept.

The Witness: Yes, I am.

The Court: You may proceed.

The Witness: As of the end of 1957, therefore, there were still less than fifty independent suppliers as compared with 123 in May of 1954.

By Mr. Saunders:

Q. Mr. Bender, have you prepared a table—

[fol. 998] Mr. Bergson: May I interrupt a moment, your Honor, to suggest a possible way of expediting this?

The Court: Yes.

Mr. Bergson: Would it be more helpful if I cross-examined on each chart as it went in?

The Court: I do not think so. I think it would prolong matters.

By Mr. Saunders:

Q. Have you prepared a table, Mr. Bender, reflecting the ranking and relative size of dealers in fluid milk in the Washington metropolitan area in the period immediately prior to the acquisition of Embassy Dairy?

A. Yes, sir.

Q. Would you identify by its exhibit number that table for us?

A. That table is Plaintiff's Exhibit No. 90 and the accompanying chart plaintiff's Exhibit No. 91.

Q. By reference to the chart, which I take it is also a picturization of the data contained in plaintiff's Table Exhibit No. 90, using the chart which is Plaintiff's Exhibit No. 91 for identification, would you explain what the data shows?

The Court: In a sense, you know, it is really very explanatory. The chart is very well done and is very clear [fol. 999] even to a person who does not deal with charts like this every day.

You may proceed.

The Witness: This chart shows the relative size of the dealers in the Washington metropolitan area based on their purchases of milk for resale as fluid milk during the period January through June of 1954 preceding the acquisition of Embassy Dairy, Inc. During that six-month period the bars which are in red indicate the dairies who are buying their milk—who were buying their milk from the defendant Association.

The green bar showed the dairies which were buying their milk from sources other than the Defendant.

By Mr. Saunders:

Q. In some instances I notice, Mr. Bender, that the bars have two colors.

A. Wherever the bars have two colors, that indicates that the dairy was buying some of its milk from the Association and some from other sources.

The Court: In order that there may be no ambiguity, the Court observes that on the photostats of the enlarged chart the two colors are black and white instead of red and green.

[fol. 1000] By Mr. Saunders:

Q. Is it not correct, Mr. Bender, that the part of the bar that comes out black on the photostat corresponds to the part of the bars colored in red on the chart you are using to demonstrate these data?

A. Yes, sir, that is correct.

Q. Would you continue, Mr. Bender?

A. As of this period, the three largest dairies were buying almost all of their milk from the Defendant Association. Chestnut Farms, the largest dairy, was buying all of its milk from the Defendant. Lucerne, the third largest, was also buying all of its milk from the Defendant. Thomp-

son's, the second largest, was buying all but a very small portion from the Defendant.

The next largest dairy, the fourth largest dairy in the market, was Embassy Dairy, Inc., which, during that period, was buying 99 per cent of its milk from sources other than the defendant. The only other dairies which were buying milk other than from the Defendant during that period were Wakefield Dairy, which was buying 78 per cent from sources other than the defendant, High's Dairy and Hadley Dairy.

At the time of the acquisition, therefore, the purchase of Embassy Dairy resulted in the elimination as an outlet [fol. 1001] of independent milk of the largest independent dairy in the market and left, as of that time, only Wakefield buying part of its milk from outside sources, High's and Hadley.

Mr. Bergson: I object to that, your Honor. I think it states a certain conclusion of law.

The Court: No, that is not a conclusion of law. I think an expert witness has to be given some leeway.

By Mr. Saunders:

Q. Mr. Bender, have you prepared a table which sets forth the ranking and relative size of dealers in the Washington metropolitan area, based upon their purchases of milk for resale as fluid milk in the period immediately prior to the acquisition by Defendant of the stock of Richfield and Wakefield Dairy Corporations?

A. Yes, sir.

Q. Would you identify the table which reflects that data, Mr. Bender?

A. Plaintiff's Exhibit 92 and the accompanying chart, Plaintiff's Exhibit 93.

Q. Is the chart, Plaintiff's Exhibit 93, a picturization of the data contained in the table, Plaintiff's Exhibit 92?

[fol. 1002] A. Yes, sir.

Q. Using the chart, Mr. Bender, would you explain what the data reflects?

A. This chart deals with the period January through November, 1957, just preceding the acquisition of Richfield.

We again show by red the dairies buying their milk from the defendant Association and by green, milk purchased from other sources.

Q. I take it, Mr. Bender, that by comparison with the photostatic copies which are marked as exhibits, the portions marked in red would be black on the photostats?

A. Yes, sir.

The Court: Let it be understood right along.

By Mr. Saunders:

Q. Would you explain further what the chart shows, Mr. Bender?

A. During this eleven-month period preceding the acquisition, Wakefield-Richfield accounted for seven per cent of the milk for resale as fluid milk. During that period Embassy accounted for 8.6 per cent. Based on this time period, the merger of these two companies brings the combined figure for these companies during this period up to 15.6, as I have indicated on this chart by the broken line. [fol. 1003] The effect of that is to make Embassy, combined with Wakefield and Richfield, as of that period the second largest dairy in the market, second only to Chestnut Farms, slightly larger than Thompson Dairy.

Q. I direct your attention now to Plaintiff's Exhibit for identification No. 94, Mr. Bender. Is this exhibit, which combines data for the years 1953 and 1954, not the same data as is reflected in tables A and C of Stipulation No. 11 which has been entered into between the parties?

A. Yes, sir.

Mr. Saunders: I offer these tables, your Honor, in evidence. I am going to offer all the exhibits but I want to point out this is stipulated data in exhibit No. 94.

The Court: They may be admitted.

(Government's Exhibits 88 to 94, inclusive were admitted in evidence.)

By Mr. Saunders:

Q. Have you prepared a chart which depicts the information contained in Plaintiff's Exhibit for identification No. 94, Mr. Bender?

A. Yes, sir.

Q. Would you identify the chart by its exhibit number?

[fol. 1004] A. Plaintiff's Exhibit 95.

Q. Using Plaintiff's Exhibit 95, would you explain what the chart shows?

A. This chart shows the defendant's per cent of total purchases by dealers in the Washington metropolitan area of milk for resale as fluid milk during the years 1953 and 1954. The chart indicates that the defendant's share of the market during 1953 and the first half of 1954 averaged in the area of 85 to 86 per cent. There was a slight downward trend in the defendant's share of the market during this period. The weighted average for the first six months of 1953 was 86.6 per cent, and for the first ix months of 1954 85.2 per cent.

During July of 1954, when the acquisition was being effectuated, the defendant's share rose to 92.5 per cent, and as of August, 1954 when the merger took place, the defendant accounted for 94.4 per cent of all the milk in the Washington metropolitan area.

The figure remained above 90 per cent for the remainder of the year. The purpose of this chart is to show the effect of the Embassy acquisition on the defendant's share of the market and contrast it with the period preceding it for ap-

[fol. 1005] proximately the year and a half period preceding it.

Q. Mr. Bender, have you prepared a table setting forth data with respect to the quantities of D.C. licensed milk required by dealers with D.C. Health Department Permits for resale as fluid milk during the period 1953 to 1957?

A. Yes, sir.

Q. Would you identify that table by its exhibit number?

A. Plaintiff's Exhibit No. 96.

Q. Have you prepared a table which sets forth the defendant's percentage of sales of D. C. licensed milk required by dealers with D. C. Health Department permits or licenses for resale as fluid milk during the period 1953 to 1957?

A. Yes, sir.

Q. Would you identify it by its exhibit number, please?

A. The table is Plaintiff's Exhibit 97 and the accompanying chart, Plaintiff's Exhibit 98.

Q. The chart, Exhibit 98, is a picturization of the data set forth in Exhibit 97?

A. Yes, sir.

Q. Would you explain what the chart reflects?

[fol. 1006] Mr. Bergson: I object, your Honor. I do not think these have any bearing on the issues in this case. The charge in the case is that we acquired a position—created a monopoly or tended to eliminate competition in the resale of milk in the Washington metropolitan area, and there was nothing in the charge with respect to the District of Columbia Health Department licensed milk. And Mr. Saunders is now attempting to break down the areas of the market and introduce a new charge.

The Court: I am afraid I have to confess ignorance, Mr. Saunders. They say confession is good for the soul. I have not understood right along why you segregated D. C. licensed milk. The figures that have gone before, I think, are very relevant. But does it not confuse the issue by segregating the D. C. licensed milk from the other milk?

Mr. Saunders: Your Honor will recall in my opening statement I indicated that because of the District of Columbia licensing feature which places upon this milk a singular characteristic, namely, that only milk with District of Columbia licensing may be processed in dealers' plants in Washington—

The Court: I understand all that but why do you segregate D. C. licensed milk?

[fol. 1007] Mr. Saunders: Because, your Honor, as I indicated, it may well be that in the context of this case, the D. C. licensed milk alone is a separate line of commerce within the meaning of Section 7.

The Court: Well, all milk that is sold in the District of Columbia has to be D. C. licensed milk, does it not?

Mr. Saunders: No, your Honor. It is partially true. All milk which is processed for resale to consumers in the District of Columbia. Now, with respect to Government installation milk, it need not be D. C. licensed.

The Court: I am going to overrule the objection.

By Mr. Saunders:

Q. Would you explain, Mr. Bender, what Plaintiff's Exhibit 98 depicts?

A. This chart shows the defendant's percentage of sales of D. C. licensed milk required for resale as fluid milk by dealers with D. C. Health Department permits or licenses during the five-year period 1953 through 1957.

Prior to the acquisition the defendant accounted for between 85 and 86 per cent of the milk—of this milk. After the acquisition, during the period August-December 1954, [fol. 1008] the percentage increased to 93.9 percent. There was a slight decline during the next few years. In 1956, when the complaint was filed, the defendant still accounted for 90 per cent of the milk. As of the last year, 1957, the percentage accounted for was still substantially greater than prior to the acquisition.

Q. Have you prepared a table, Mr. Bender, which reflects the percentage of estimated requirements of fluid milk of Federal installations in the Washington metropolitan area awarded to individual dealers in the pre-acquisition period, 1953 to July, 1954?

A. Yes, sir.

Mr. Bergson: I understand now, Mr. Saunders, you are shifting back to area rather than D. C. inspected milk?

Mr. Saunders: I am not shifting anything. I am asking Mr. Bender to testify as to charts he prepared.

The Court: Now, I am a little bit perplexed, Mr. Saunders. The prior charts dealt with sales and this seems to deal with estimated requirements. Why the shift from sales to estimated requirements?

Mr. Saunders: Your Honor, the Government awards contracts on the basis of a certain amount of estimated [fol. 1009] requirements of milk. Then it places purchase orders over a period of time, which may change.

The Court: I see.

By Mr. Saunders:

Q. Have you prepared such a table, Mr. Bender?

A. Yes, sir.

Q. Would you identify that by its exhibit number?

A. Plaintiff's Exhibit 99.

Q. Have you prepared a chart which depicts the data contained on Plaintiff's Exhibit 99 for identification?

A. Yes, sir.

Q. What is the exhibit number of the chart?

A. Plaintiff's Exhibit No. 100.

Q. Using Plaintiff's Exhibit No. 100, would you explain what that chart depicts?

A. This chart shows the percentage of estimated requirements of fluid milk, excluding cream and cottage cheese, of Federal installations in the Washington metropolitan area awarded to individual dairies for the period 1953 and January through July, 1954, the period immediately prior to the acquisition. This chart shows that Embassy Dairy was by far the largest dairy in terms of Federal installation sales [fol. 1010] during the pre-acquisition period.

During the year 1954, Embassy alone accounted for 49.6 per cent of all the sales in the market based on these estimated requirements.

Q. Pardon me, Mr. Bender. You mean 1953, do you not?

A. 1953, yes. During 1953.

During the period January through July, 1954, the percentage was 47.7 per cent. Richfield and Wakefield were also substantial companies with respect to sales to Federal installations. In 1953 Richfield accounted for 13.8 per cent of the total and Wakefield 11.2 per cent.

And in January through July, 1954 Wakefield had 20.3 per cent and Richfield 11.5 per cent.

Q. Mr. Bender, have you prepared a table which sets forth data concerning the percentage of milk supplied by defendant to dealers for resale as fluid milk to Federal installations in the Washington metropolitan area?

A. Yes, sir.

Q. Covering the period 1953 to 1957, Mr. Bender?

A. Yes, sir.

Q. Would you identify the table by its exhibit number?

[fol. 1011] A. Plaintiff's Exhibit 101.

Q. Has a chart been prepared which depicts the data set forth in plaintiff's exhibit for identification No. 101?

A. Yes, sir.

Q. Would you state the number of the chart?

A. Plaintiff's exhibit 102.

Q. Using plaintiff's exhibit 101, Mr. Bender, would you explain what the chart, exhibit 102, depicts?

A. This chart shows the percentage of milk—the percentage of Federal installation fluid milk which was accounted for by the defendant Association before and after the acquisition of Embassy Dairy, Inc.

The chart reads "Source of Supply of Milk for Resale as Fluid Milk to Federal Installations in the Washington Metropolitan Area Before and After the Acquisition of Embassy, 1953-1957."

Again we have excluded cream and cottage cheese. Prior to the acquisition the Association accounted for between 45 and 47.3 per cent of this milk. Immediately after the acquisition during the August-December, 1954 period, the Association's share of this business went up to 91.7 per cent. It was 83.6 per cent in 1955. It was 62.9 per cent in 1956, and then it rose again in 1957 to 74.8 per cent. During [fol. 1012] this entire post-acquisition period the defendant accounted for approximately 75 per cent of the federal installation sales as against approximately 46 per cent during the period prior to the acquisition.

Q. You have concluded using the large charts you prepared, Mr. Bender, have you not?

A. Yes, that is all.

Q. Would you step to the witness stand because there are a few more tables I believe which have been marked as exhibits?

(Witness resumed the witness chair.)

By Mr. Saunders:

Q. Have you prepared data, Mr. Bender, and placed in table form which reflects the total value or the value of estimated requirements of fluid milk by Federal installations in the Washington metropolitan area?

A. Yes, sir.

Q. What table is that, Mr. Bender?

A. Plaintiff's Exhibit 103.

Q. What does that show, Mr. Bender?

A. That shows the dollar value of estimated requirements of fluid milk, excluding cream and cottage cheese, of Federal installations of the Washington metropolitan area. [fol. 1013] It shows the dollar value ranges from in the area of somewhat over $2 million. In 1953 the figure was $2,166,015 and in 1957 $2,728,747.

The Court: It seems amazing that the Government would buy $2 million worth of milk a year for the Federal installations in the Washington metropolitan area.

By Mr. Saunders:

Q. Mr. Bender, have you prepared—

The Court: Of course, nowadays, soldiers drink more milk than they used to years ago. And that is really a fact.

Mr. Saunders: Yes, your Honor. Your Honor remarked yesterday that they used to drink it in condensed form.

By Mr. Saunders:

Q. Have you prepared a table, Mr. Bender, which sets forth a comparison of average daily shipments of milk by members of the defendant when compared to the average daily shipments of the former Embassy producers, those supplying Embassy independently of the Association?

A. Yes, sir.

[fol. 1014] Q. Would you identify the table, please?

A. Plaintiff's Exhibit 104.

Q. Would you just summarize what that table reflects?

A. That table shows that the shippers to Embassy Dairy, Inc. shipped somewhat larger quantities of milk on the average than the shippers who were members of the defendant association. The average of the independent shippers was 109.8 gallons per day for the entire period shown on the chart from April, 1953 through June, 1954, and the members of the defendant Association's average was 102.7 gallons per day.

The Court: Now, before you pass on, there is something about that that I would like to have cleared up. According to exhibit 104 approximately the amount shipped by independent producers was about the same as that

shipped by members of the defendant association, is that correct?

The Witness: Your Honor, these are average figures.

The Court: I understand but the average is about the same, is it not?

The Witness: The average per shipper is somewhat larger.

The Court: This is per shipper?

[fol. 1015] The Witness: Per shipper.

The Court: I see. I was thinking that you were comparing the total amount shipped.

The Witness: No.

The Court: That clears up my difficulty.

By Mr. Saunders:

Q. Mr. Bender, have you prepared data reflecting Embassy Dairy's purchases of milk bought from the defendant and from other sources than defendant for resale as fluid milk during the period a year and a half prior to the acquisition?

A. Yes, sir.

Q. Would you identify that table by its exhibit number?

A. That is Plaintiff's Exhibit 105.

Q. Would you again very briefly, Mr. Bender, summarize what this table shows?

A. This table shows the sources of supply of milk of Embassy Dairy, Inc., prior to the acquisition. It shows that the large majority of purchases of milk of Embassy Dairy were from sources other than the defendant. In 1953 the Embassy Dairy, Inc. purchased 44,613,000 pounds of milk from sources other than the defendant and only 5,742,000 pounds from the defendant. Percentagewise, 88.6 [fol. 1016] per cent from the defendant. The trend was even stronger toward other sources in 1954.

Q. Have you prepared data, Mr. Bender, which reflects the total purchases by all dairies located in the Washington metropolitan area of milk for resale as fluid milk for the period 1953 to 1957?

A. Yes, sir.

Q. What is the exhibit number for identification given in that table?

A. Plaintiff's Exhibit 106.

Q. Would you take a look at that table, Mr. Bender, and state what the average has run over the five-year period, approximately?

A. The number of pounds of milk for resale as fluid milk in the Washington metropolitan area has ranged from 567,000,000 to 685,000,000 during the period 1953 through 1957. The trend has been steadily upward.

The Court: Mr. Saunders, I was under the impression that milk was sold by quarts and gallons and this shows pounds.

Mr. Saunders: Milk is sold at the producer level, your Honor, on a hundredweight basis. The dealer then begins to figure it in quarts.

The Court: I see.

[fol. 1017] By Mr. Saunders:

Q. Mr. Bender, have you prepared data which shows the percentage of estimated requirements of fluid milk to Federal installations in the Washington metropolitan area awarded to Embassy, Richfield and Wakefield Dairies in the period 1953 to 1957?

A. Yes, sir.

Q. Would you state the exhibit number for identification of that table?

A. Plaintiff's Exhibit 107.

Q. Would you again briefly indicate what that table shows?

A. This table shows the percentage of estimated requirements of fluid milk of Federal installations in the Washington metropolitan area for Embassy, Wakefield and Richfield for the years 1953 through 1957.

Q. What does it show with respect to Embassy Dairy Division?

A. There has been somewhat of a downward trend in the percentage accounted for by Embassy Division.

Q. Have you prepared data, Mr. Bender, reflecting the defendant's prices f.o.b. Washington for milk sold dealers for resale in the Washington area compared to defendant's

prices f.o.b. Washington for milk sold to dealers for resale [fol. 1018] in certain fringe areas?

A. Yes, sir.

Q. Would you identify the number of that table, Mr. Bender?

A. Plaintiff's Exhibit 108.

Q. Would you again briefly summarize what this table shows?

A. This table shows the contrast in the prices in the Washington metropolitan area for Class I milk with the prices in the fringe areas.

Q. When you say "in the fringe areas," Mr. Bender, are not these the prices f. o. b. Washington?

A. Yes, sir, these are the prices f. o. b. Washington.

Q. Just as an example, taking the figure for January, 1954 for Eastern Shore and Southern Maryland, what does the figure 5.40 represent?

A. That is the price of 100 pounds of milk sold to a dealer in Washington.

The Court: For shipment to the Eastern Shore?

The Witness: For shipment to the Eastern Shore and Southern Maryland.

Mr. Saunders: Thank you, Mr. Bender.

I might as well take this opportunity, I was going to do so later, your Honor, but since Mr. Bergson is deliberating [fol. 1019] there, I offer the exhibits for identification Nos. 88 through 108 into evidence.

Mr. Bergson: May they be admitted one by one, your Honor, because I have objections to some of them.

The Court: Objection overruled.

(Government Exhibits 88 through 108 are received in evidence.)

Cross examination.

By Mr. Bergson:

Q. Mr. Bender, addressing your attention to Exhibits 88 and 89, I notice that you have no bar and no figures for the months of July and August, 1954. Would you please tell us why you omitted those figures?

A. The data showed that prior to the acquisition there were between 119 and 124 independent producers—

The Court: I am afraid you are not answering the question.

By Mr. Bergson:

Q. The question was, why didn't you include any information in regard to those months?

A. We had information for only 68 of the producers during July of 1954 and we did not have a full accounting of the producers until the period of September and October, 1954.

[fol. 1020] The admissions from which we prepared the data did not account for all of the producers. We were attempting to account for all of the independent producers as of May, 1954.

By Mr. Bergson:

Q. Are you suggesting that we had the obligation to furnish this information?

Mr. Saunders: I object, your Honor.

The Court: Let me interject a question. You mean that your data for July and August, 1954 were incomplete? Is that what you mean?

The Witness: Yes, sir.

The Court: And that is the reason why you omitted reference to those two months in this chart?

The Witness: Yes, sir, that is correct.

By Mr. Bergson:

Q. Does this chart take into account in any way the shippers who elected to stay with Green Springs Dairy?

A. No, sir. The title of the chart says "Independently of the Association."

Q. And how many shippers elected to stay with Green Springs Dairy?

A. Between—

Mr. Saunders: I must object, your Honor, to the use of [fol. 1021] the word "elected."

The Court: I think that is proper cross-examination.

Mr. Bergson: I will strike the word "elected" and say how many stayed with Green Springs Dairy?

The Court: Do I understand that Green Springs Dairy was not supplying the Washington market?

Mr. Bergson: Green Springs Dairy, your Honor, was the Baltimore Dairy owned by Mr. Ward.

The Court: That is what I thought. I just wanted to have my recollection refreshed on the testimony.

You may answer.

The Witness: The number of shippers who stayed with —who elected or went to Green Springs Dairy was 64 for the first period for which I have data, and declined to 21 as of December, 1957.

The Court: Well, does that mean—do I correctly infer that those were producers who had previously shipped to Embassy?

The Witness: Yes, sir.

The Court: And after that they were shipping to Green Springs for the Baltimore market?

The Witness: Yes, sir.

The Court: Very well.

[fol. 1022] Q. Now, does your chart take into account the shippers who went to Massey Dairy?

The Court: What dairy?

Mr. Bergson: Massey, M-a-s-s-e-y.

The Witness: This chart shows only the dairies shipping to the Washington metropolitan area independently of the Association.

Massey Dairy is not a dairy in the Washington metropolitan area.

By Mr. Bergson:

Q. So this chart is limited solely to show which of the Embassy shippers came on to the Washington market independently of the Association, and it does not take into account the dairies—I mean, the producers who stayed with Green Springs; it does not take into account the shippers who joined Maryland and Virginia Milk Producers Association, it does not take into account the shippers who

joined Massey Dairy, Excelsior Dairy, High's Dairy in Baltimore, or those shippers who ceased operating as shippers?

A. It depends on what you mean by "does not take them into account." When you count up the total number of producers who were shipping into the Washington metropolitan area before the acquisition and then find out how [fol. 1023] many of them were shipping into the market independently of the Association after the acquisition you are taking account of all of them.

The Court: I think you made your point.

Mr. Bergson: I think so. Before I conclude on this examination—

By Mr. Bergson:

Q. Do you know what price was paid to the shippers who went to Green Springs Dairy with Mr. Ward?

A. No, sir.

Q. May I show you—

The Court: I think that is outside of the scope of the direct examination. There is nothing about prices in this chart or any of the charts.

Mr. Bergson: The purpose, your Honor, of offering this was to show that the dairies who shipped to Green Springs got exactly the same price that they would have gotten had they stayed on the Washington market.

Mr. Saunders: I am afraid Mr. Bergson can't expect to show it through this witness, your Honor.

The Court: I think that is part of your case, Mr. Bergson.

By Mr. Bergson:

Q. Mr. Bender, directing your attention to Plaintiff's [fol. 1024] Exhibits 90 and 91, I notice that you adopt the period January to June, 1954. This entire period was prior to the Embassy acquisition. Did you have any figures showing what the relative positions of these dairies were after the Embassy acquisition?

A. Yes, sir, they were in the stipulations which we worked out jointly.

Q. Why were they not included in this chart?

A. This chart was designed to show the relative size of the dairies immediately preceding the acquisition of Embassy Dairy. So that we would be able to show what the structure and size of the companies were at the time that the defendant purchased Embassy Dairy, Inc.

Q. Now, the next chart which is plaintiff's Exhibit 93, takes in the period January to November, 1957. Why was no chart prepared for the intervening periods?

A. This chart was prepared—plaintiff's Exhibit 93 was prepared on exactly the same principle as plaintiff's Exhibit 91, to show the relative size of the companies and the structure of the industry just preceding the Wakefield-Richfield acquisition just as the preceding chart showed the relative size and the structure preceding the acquisition of Embassy.

Q. Then you have no charts showing the relative size of [fol. 1025] Embassy Dairy after—for the period August, 1954 through January, 1957 showing the relative positions of Embassy Dairy and the other dairies in the market?

A. I prepared no other charts than those you saw.

Q. And you have no charts showing the relative positions of the dairies in the Washington metropolitan area after the acquisition of Richfield-Wakefield Dairies?

A. That acquisition was as of December, 1957. The stipulations which we worked on—

The Court: I think you should answer questions directly, Mr. Bender. I presume your answer is no?

The Witness: I have none after December, 1957.

By Mr. Bergson:

Q. Now, directing your attention again to plaintiff's exhibit 93, which is the chart from January to November, 1957, is the figure that you have allocated to Richfield-Wakefield Dairies the average figure for the year—for that period?

A. Yes, sir.

Q. Now, at the time of acquisition what was the percentage of the market enjoyed by Richfield-Wakefield Dairy?

The Court: Would you refresh my recollection? What was the date of the acquisition of Richfield-Wakefield?

[fol. 1026] Mr. Bergson: December 6, 1957.

The Witness: And your question is what, sir?

By Mr. Bergson:

Q. Do you have the figures of the percentage of the market enjoyed by Wakefield-Richfield Dairies in the month immediately preceding the acquisition?

A. Yes, they're in the stipulations.

Q. And what is that figure?

A. During the month of November? Is that the month you are asking about?

Q. That is the month.

A. November, 1957, Wakefield's percentage was 5.2 per cent.

Q. 5.2 per cent?

A. Yes, sir.

Q. That is not 7 per cent, is it?

A. 7 per cent is the average for the eleven-month period.

Q. But when Richfield-Wakefield was acquired and you added its total to Embassy, isn't it misleading to add the figure 7 per cent when the dairy was only doing 5.2 per cent of the business?

A. It is not misleading at all. It is proper to look at the size of the dairies for a reasonable period preceding the [fol. 1027] acquisition. And a reasonable period preceding the acquisition is that eleven-month period.

Q. Now, as an economist, when a business is acquired, isn't it ordinarily expected that a certain amount of the acquired business will not go to the acquiring company?

A. I have never made any particular study of that problem, Mr. Bergson.

Q. You haven't heard or you do not know then that it is generally regarded that one should expect between a 20 to 30 per cent loss of business?

A. I have never heard that figure or anything relating to it.

Q. Have you made any study of the figures of Embassy Dairy after the acquisition of Richfield Dairy, Richfield-Wakefield Dairies?

A. No, sir.

Q. So you do not know that Richfield—Embassy lost a considerable portion of the Richfield sales after it acquired Richfield?

A. No, sir, I do not.

Q. Now, you made the statement, when I inquired about your addition of 7 per cent to the sales of Embassy, that it was customary to consider a considerable period prior to [fol. 1028] the acquisition in evaluating the effect of the acquisition?

A. I said a reasonable period.

Q. Isn't it equally customary to consider a reasonable period after the acquisition?

A. In what connection? I don't quite understand.

Q. Well, these charts I understand were submitted for the purpose of showing the effect of the Embassy acquisition on the market. Now, you have taken the figures at the time of acquisition and immediately prior to the acquisition and you completely ignored the figures within a reasonable period after the acquisition.

A. I think what I have done is perfectly proper. When two companies merge and you are interested in looking at the competitive structure of the industry, leading up to the time of the merger, so you can have some measure of the effect of the merger upon the competitive structure of the industry, you look and see what happened prior to the acquisition.

Q. And you do not look to see what happened after the acquisition?

A. In what connection are you asking me?

The Court: Now, just a moment. You have to answer questions, not ask them. I think that is argument, Mr. [fol. 1029] Bergson.

Mr. Bergson: I think so.

By Mr. Bergson:

Q. I now direct your attention to plaintiff's Exhibit 95, which I believe you testified is an exhibit to show the total percentage of purchases by dealers from the defendant for milk for resale as fluid milk in 1953 and 1954, right?

A. Yes, sir.

Q. Now, at the time you prepared this chart, did you have available to you the figures for 1955, 1956 and 1957?

A. Yes, sir.

Q. Would you look at your figures for the year 1957, and tell us what percentage of total sales was enjoyed by the defendant at that time?

A. During 1957, 85.9 per cent.

The Court: What was it?

The Witness: 85.9.

By Mr. Bergson:

Q. Now, the first figure on your chart is 88.9?

A. Yes, sir, but that is a monthly figure and the 85.9 is the yearly figure.

Q. What is the yearly average for 1953?

A. 86.5.

[fol. 1030] Q. And the figure for 1957 was what?

A. 85.9.

Q. 86.5, 85.9. A drop of .6 of a per cent from the period prior to the acquisition of Embassy Dairy to the present? Is that right?

A. The average in 1953 to 1957? Yes that is correct.

Q. May I ask you why you cut this chart off at 1954?

A. Yes. I think that it was very correct to show the effect of Embassy acquisition on the defendant's share of the market. The Embassy acquisition resulted in an increase from 86 per cent in June of 1954 to 94.4 per cent during the month of acquisition. That was the immediate direct effect of the acquisition and that was what the chart was designed to show.

The Court: But apparently that rise in the percentage was only temporary, was it not? It went down again so that it reached 85.9 per cent in 1957. Is that correct?

The Witness: It was 85.9 in 1957.

The Court: Would you say then that the rise in the percentage in July and August and the few months thereafter of 1954 was of a temporary character because the percentage settled back again to the prior level?

[fol. 1031] The Witness: I think the elimination of Embassy, your Honor, was of a very permanent character and that 9 per cent approximately was eliminated from the market.

The Court: Well, that is a matter of argument.

By Mr. Bergson:

Q. May I direct your attention to the rule of law that says that you should look to the long-range effects of a merger in considering its effect on the market?

The Court: Well, you can argue that, Mr. Bergson.
I think we will recess at this time for our luncheon period.

(At 12:30 p.m. a recess was taken until 1:45 p.m.)

[fol. 1032] AFTERNOON SESSION

(Thereupon, the trial was resumed at 2:15 o'clock p.m.)

The Court: We will proceed with the case on trial.
I am sorry I was delayed but I was tied up in one of our periodical executive sessions of the Court. We generally have those executive sessions at the noon hour.

Mr. Bergson: Days are not quite long enough, are they, Your Honor.

The Court: Sometimes they last a few minutes longer than scheduled.

Thereupon, HARRY BENDER having been previously sworn, resumed the stand and testified further as follows:

Mr. Bergson: I apologize for this prolonged examination, Your Honor.

The Court: No, you are within your rights. No explanation or apology is necessary.

Cross examination (Continued).

By Mr. Bergson:

Q. Mr. Bender, going back to the chart that we were discussing at the time the Court adjourned for the noon

recess, which I believe was Government's Exhibit 95, to the one on the blackboard. I asked you why you had cut that [fol. 1033] chart off at December, 1954, and I think your answer was that you considered that the only period relevant in respect to the Embassy acquisition was that period, am I correct?

Mr. Saunders: I object, Your Honor. It calls for a legal conclusion on the part of the witness.

The Court: Objection overruled. I think this is proper cross examination.

The Witness: I don't think I said that that was the only—

The Court: You will have to readjust your voice to the way you did before. Suppose you start your answer over again.

The Witness: I said that the period preceding the acquisition was a very significant period in appraising the effect on the defendant's share of the market and on competition.

By Mr. Bergson:

Q. And that you cut the chart off at December, 1954, because you did not consider the period after that to be significant?

A. My position in making up this chart was that it was very significant to make an analysis of the size of the companies and the structure of the industry at the time the defendant acquired Embassy Dairy, Inc.

[fol. 1034] Q. This chart relates only to the purchases by dealers in the metropolitan area of milk for resale as fluid purposes?

A. That is right.

Q. And while, although you had the figures available to you, you decided that that, for the purposes of this case, it was appropriate to cut the chart off at December, 1954?

A. I participated in the discussions on working out the stipulations for all years. I selected the year 1954 as a relevant year in analyzing the acquisition which took place in August of '54.

Q. And the fact the figures in 1957 showed a decrease from those in 1953 did not enter into your determination?

A. In another chart, which I introduced—

Q. I would appreciate your answering my question.

A. Will you repeat the question, please?

Q. I say that although you had the figures available to you and although they had been stipulated to by the defendant and yourself, you decided to cut it off in 1954 and I ask you whether the fact that the defendant's share of the market was less in 1957 than it was in 1953 had anything to do with your decision to cut it off at that time.

A. No; it had nothing to do with my decision to cut it off. I was interested—

[fol. 1035] The Court: No. Just answer questions and do not go beyond that.

The Witness: Yes, sir.

By Mr. Bergson:

Q. You stated, before the noon recess, that in analyzing these cases, the periods to be considered was a reasonable period prior to the acquisition and the period at the time of the acquisition.

A. As I recall my statement, it was—

The Court: Just a moment. What was your question?

Mr. Bergson: Did you not—

The Court: He did say that.

Mr. Bergson: He did say that.

The Court: So you do not have to ask him again.

By Mr. Bergson:

Q. In view of that, Mr. Bender, I ask you why, in preparing charts No. 89, No. 98 and No. 102, you did not use the same termination date?

A. In making up the chart 89, with respect to the information, the basic information which appears in the chart that you are referring to, chart 95 for 1954, I call your attention—

The Court: No. You are not answering the question and you must not call anything to counsel's attention. That [fol. 1036] is not a witness' function.

Miss Rawls, read the question, please.

(Thereupon, the last question was read by the reporter.)

The Witness: I didn't use the same termination date in chart 95 because I wanted to concentrate on the period immediately adjacent to the acquisition of Embassy Dairy, Inc. In the other charts, different data were being analyzed and I covered the entire period.

By Mr. Bergson:

Q. Why, Mr. Bender, is the period relevant for some purposes and not for other purposes in a Section 7 case, in a case of this kind?

Mr. Saunders: Your Honor, this gets a little bit broader than the former question and calls for a legal conclusion.

The Court: I am going to allow this cross examination. I think it is bordering on the argumentative.

Mr. Saunders: I object on the ground that it is argumentative.

The Court: I am going to overrule the objection. Defendant's counsel is entitled to a certain amount of leeway in cross examination.

By Mr. Bergson:

Q. May I ask whether or not the reason might not have [fol. 1037] been that the picture looked better when you used those figures?

A. No, that had nothing to do with it because I showed a chart for '57 as well as for '54 and '57 is the period which you indicate the defendant's share of the market tended to decline somewhat. That chart I put in—

The Court: I do want to make this suggestion, Mr. Bergson. I am not going to cut off these questions but I do wonder whether that had better not be done in summing up. Of course, if this were a jury trial, I could see the desirability of this cross examination. I think you can accomplish the same result in your summing up and I am going to give you full leeway in summing up.

Mr. Bergson: I think I have made my point, anyway, Your Honor.

The Court: Yes, I think you have.

By Mr. Bergson:

Q. Directing your attention again to chart 95, was that chart prepared from data stipulated to between the parties?

A. Yes, sir.

Q. Do the tables which were stipulated to show the percentage of the market enjoyed by Embassy Dairy in the year 1953?

[fol. 1038] A. Yes, sir.

Q. What was that percentage?

A. For the year 1953, Embassy's per cent was 8.9 per cent.

Q. What was it for the year 1957?

A. 8.6 per cent.

The Court: What was it in July of '54?

Mr. Bergson: That is the question I was coming to, Your Honor.

The Witness: 10.6 per cent.

The Court: In July, 1954, Embassy Dairy had 10.6 per cent of all sales to dealers, is that what you mean?

The Witness: Of all milk for resale as fluid milk to dealers in the Washington area.

The Court: Suppose I translate that into my language. It sold 10.6 per cent of all fluid milk to dealers in the metropolitan area?

The Witness: To dealers and to others; Federal installations, Government installations in the area.

Mr. Bergson: Your Honor, there are two sets of tables that were stipulated to. One was in the form of purchases and one was in the form of sales. We have the information on sales and we will put it in in our case.

The Court: Is this sales or purchases?

[fol. 1039] The Witness: This is purchases for resale.

The Court: Purchases, and not sales?

Mr. Bergson: That is right.

The Court: Just a moment. I want to straighten this out. You mean that of all the milk purchased from pro-

ducers for resale in the Washington metropolitan area, Embassy's percentage was 10.6 per cent?

The Witness: Yes, sir.

The Court: Will you give me again the figure for 1957?

Mr. Bergson: May I interrupt, Your Honor? As long as you are taking up July of 1954, may I ask you to take the last figure on the chart of 1957?

The Court: Very well, December of 1957.

The Witness: 8.0 per cent—no, excuse me. That is the wrong page.

Mr. Bergson: Isn't it ten point something?

The Witness: I was on the wrong page. It is 10.3 per cent.

The Court: Of course, that is the Embassy Division.

Mr. Bergson: That is Embassy Division, Your Honor.

The Court: Do you have similar, corresponding or parallel figures for sales of milk?

Mr. Bergson: Yes, Your Honor.

[fol. 1040] The Court: Have you?

The Witness: These are purchases for resale.

The Court: You do not have sales?

The Witness: These are purchases for resale.

The Court: You do not have figures on sales. These are figures of purchases.

Mr. Bergson: I submit, Your Honor, he does have figures on sales because we stipulated to them.

The Court: You have not testified as to sales, have you?

The Witness: No, I have not; not as to sales.

The Court: Have you got those figures?

The Witness: These are purchases for resale.

The Court: I understand, but now I am on something else. They are two different things. One is the amount of milk purchased from producers for resale. The other is the amount of milk actually sold by the dairies. The two figures, I presume, would be not far apart but they would not be necessarily the same.

Do you have corresponding figures for sales by dairies either to dealers or to other consumers?

The Witness: Yes, sir, we have figures for sales within the Washington metropolitan area.

The Court: What was the percentage Embassy had in [fol. 1041] July, 1954 and in December, 1957?

The Witness: The figures that were stipulated are for the entire year '54.

The Court: If you do not have them for the particular month, give them for the year.

The Witness: For the year 1954—

The Court: I do not want that because there is a break in the middle of 1954.

The Witness: What year did you ask for, Your Honor?

The Court: Have you got the figure covering some period immediately prior to the acquisition of Embassy?

The Witness: Yes, sir, we have a figure for 1953.

The Court: No. Have you got the figure for the first half of 1954? In other words, I want to get the picture as of the date of the acquisition.

Mr. Saunders: Your Honor, we stipulated a lot of information.

Mr. Bergson: We stipulated on an annual basis on these sales because both sides figured, as far as the year 1954 was concerned, we could rely on the 1954 figure one way or the other.

The Court: Then perhaps the figures on purchases will suit my purpose.

Mr. Bergson: I think Your Honor would be interested [fol. 1042] in the figures on sales.

The Court: I think I would be because I think, taking the year 1954 as a whole, would cast no light on the issues. I think it would cast light on the issues if we could have figures in 1954 prior to August 1 and in 1954 subsequent to August 1. I am not going to press the matter. If the figures are not readily available—

Mr. Bergson: May I suggest to Your Honor that we put in the record at this time the figures that we do have? We have '53, '54, '55, '56, and '57.

The Court: I have no objection to your putting them in the record but that does not answer my question because what seems to me to be governing, as far as this aspect of the case is concerned, is what was the picture at the time of the acquisition of Embassy by the defendant. Of course, that does not mean on the very day of acquisition because

that particular day might have been an exceptionally good day or an exceptionally bad day, but a month or two, perhaps even six months preceding the date of acquisition and a similar period immediately following the date of acquision. But, if that is not readily available, I am not going to press the matter.

By Mr. Bergson:

Q. Would you please state the percentage of sales Em-
[fol. 1043] bassy had for the year 1953?

A. We don't have the entire year '53.

Q. From May to December, 1953. This was the only period the figures were available.

Mr. Saunders: May I ask, for purposes of clarification, what sales are now being referred to, Your Honor?

The Court: I think that would be helpful.

By Mr. Bergson:

Q. Sales of fluid milk in the Washington metropolitan area by all dealers in said area.

For Embassy Dairy in 1953.

A. 9.9 per cent.

Q. 1954.

A. 10.6 per cent.

Q. 1955.

A. 10.2 per cent.

Q. 1956.

A. 9.5 per cent.

Q. 1957.

A. 10.2 per cent.

The Court: I think substantially, after all, gentlemen, this is not an accounting case so we do not have to get figures with mathematical precision.

Is it a fair statement that Embassy handled about ten
[fol. 1044] per cent of fluid milk, ten per cent of the total fluid milk handled in the Washington market?

Mr. Bergson: And still does.

The Court: And still does, but it is a different Embassy. I merely refer to the present Embassy as the defendant because it is nothing but a division of the defendant.

Mr. Bergson: Your Honor, one of the charges in this case is that the Embassy Division has failed to compete and has not made any effort to maintain its position.

The Court: That has nothing to do with Section 7 of the Clayton Act cause of action, as I see it. I think it makes no difference if the Embassy Division has just the same fraction of the market now as Embassy Dairy, Inc., had before. It is like saying that here is a chain of stores. The chain acquires one minor store that has four per cent of the market and you say, "Well, that store still continues to have the same percentage of market," but the point is that it was the chain that got that market and the chain annexed that percentage of the market. That is what you have here.

Mr. Bergson: I think you have a little different situation here, Your Honor, but I don't suppose this is the time to argue it.

The Court: No.

[fol. 1045] By Mr. Bergson:

Q. Mr. Bender, addressing yourself to chart No. 93, you testified that the acquisition of Richfield Dairy, when combined with Embassy, made Embassy the second largest distributor in the market, did you not?

A. No. I testified as to the statistics and I said that, based on the figures for the first 11 months of 1957, if you take the average figure for Embassy and the average figure for Wakefield-Richfield, a combination of the two figures of 15.6 per cent which is larger than any other dairy in the market other than Chestnut Farms.

Q. Do you know when the Association acquired Richfield-Wakefield Dairy?

The Court: I want to say this, and perhaps this may help both counsel: I think that this aspect of Exhibit 93 has no significance so far as the Court is concerned because I do not see how you can combine the Embassy Division of the defendant, that is, the sales of the Embassy Division of the defendant and add them up to the sales of Wakefield-Richfield Dairy which were independent and call these three together the second largest; just the converse because the

Wakefield-Richfield Dairies were not acquired until December of 1957.

I might save counsel's time and effort by saying I think this combination is incongruous. It may be correct but I [fol. 1046] do not think it should be made.

Mr. Bergson: I think it would be a good idea to get the correct mathematics into the record, Your Honor.

The Court: Yes, you can do that.

By Mr. Bergson:

Q. Taking your statistics, to which we stipulated, and looking at the month of December, 1957, what percentage of the market did Chestnut have?

A. Chestnut had 39.7 per cent.

Q. What percentage did Thompson have?

A. 14.7 per cent.

Q. What percentage did Lucerne have?

A. 12.4 per cent.

Q. What percentage did Embassy have?

A. 10.3 per cent.

Q. What percentage did Wakefield-Richfield have?

A. 2.0.

Q. And how much are 10.3 and 2.0?

A. 12.3.

Q. Is that more or less than 12.4?

A. Less.

Q. Under those circumstances, would you say that the Embassy-Richfield-Wakefield Dairy was the second largest dealer in the market?

[fol. 1047] A. I don't think, on the basis of these figures, you can say that. The acquisition took place during December and Wakefield's figures are for only a small part of the month of December.

Q. But are not the balance of Wakefield's figures included in Embassy's figures?

The Court: Now you may proceed, Mr. Bergson. I am

(A short interruption.)

The Court: Will you suspend a moment, Mr. Bergson? sorry for this suspension but we had to make some arrangement for the jury panel.

By Mr. Bergson:

Q. On the basis of these figures that you have just recited, Mr. Bender, isn't it correct that Embassy was still the fourth largest dealer in the market?

A. I don't think that conclusion follows, no, sir.

Q. You mean figures can lie?

A. No, I don't think that that conclusion follows.

The Court: Not what the statistician says about the figures lying. I always feel that statistics mean nothing unless there are explanations to go with them because sometimes figures alone are meaningless, but I think a good deal of this is argument, Mr. Bergson.

Mr. Bergson: I am sorry to shuffle around like this [fol. 1048] but these charts are a little awkward to handle.

The Court: They are a little clumsy to handle because they are bulky but that cannot be helped.

By Mr. Bergson:

Q. Mr. Bender, Table 96—I guess that is what you would call that—is entitled, "D. C. Licensed Milk Required by Dealers with D. C. Health Department Permits."

Going to Alexandria Dairy, you state that Alexandria has no D. C. licensed milk.

A. No. I say Alexandria does not have a D. C. permit for license.

Q. Why was this chart prepared to cover the years 1953 to 1957?

A. Our basic stipulated data, which we worked out jointly, and I participated in it, covered the years 1953 to 1957.

The Court: Perhaps it was because I wanted a cut-off date and perhaps they were complying with my stipulation.

Mr. Bergson: They were not when they cut the other one off in '54.

By Mr. Bergson:

Q. Addressing yourself to Highs Dairy on Table 96, does Highs Dairy buy any milk from the Association, from the [fol. 1049] defendant Association?

A. According to the stipulation, occasionally.

Q. In large or small amounts?

A. Small amounts.

Q. Would you note, for the record, the increase in Highs sales for 1953 to 1957 and you can skip the intervening years, if you want.

A. In 1953, Highs figure is 6,646,000; 1954, 7,230,000; 1955, 15,196,000; 1956, 27,665,000; 1957, 41,412,000 pounds.

The Court: I would like you to go a little slower when you come to figures. It would not make any difference if they did not have to be taken down.

By Mr. Bergson:

Q. Do you know, or does this chart show how much of Thompson's D. C. licensed shipments were obtained from the Association?

Mr. Saunders: Your Honor, I have tried to accord with Your Honor's view that there should be some liberality here but this goes beyond this table. This goes beyond the scope of the direct examination.

The Court: I am inclined to think you are going pretty far.

Mr. Bergson: Your Honor, I am mystified by this table. This is the first time that the element of D. C. licensed [fol. 1050] milk has been injected in this case.

The Court: It does not impress the Court. To the Court, it is the milk supply for the Washington area that is the significant factor. However, in justice to Mr. Saunders, I want to say that he did refer to the special item in his opening statement.

Mr. Bergson: That was on Monday for the first time and the case has been pending for many years.

By Mr. Bergson:

Q. Addressing your attention to Table 99 and chart 100, I ask you why this chart was limited to Federal installations in the District of Columbia.

The Court: I think that is argumentative. I am going to exclude that. After all, each side has the right to present its case in its own way.

One of Government's points seems to be that Embassy was the principal bidder for Government contracts because it was undercutting the others and, therefore, they want to show how the Government requirements were distributed among the dairies. That is all argument. Whether the argument is sound or not is a different proposition, but they have the right to present the matter in their own way just as you have the right to present the matter in your own way.

[fol. 1051] By Mr. Bergson:

Q. I ask you whether these figures include sales to the Marine Base at Quantico.

A. No, sir. It refers to Federal installations in the Washington metropolitan area only.

Q. Does it refer to Patuxent?

A. No, sir.

Q. Norfolk?

A. No, sir.

Q. Do you happen to know the size of the Norfolk contract?

A. No, sir.

The Court: I think that is irrelevant.

By Mr. Bergson:

Q. I notice that you have this broken down into quarts, the standard requirements based on quarts. Is it not customary for the Government to contract for a large volume of milk in half pints?

A. The footnote explains that.

Q. I am asking you the question. Is not the large percentage of Government requirements in half pints?

A. A lot of milk is purchased in half pints. I don't know whether it is the largest percentage, or not.

Q. Is it not a fact that it is more difficult to bottle milk [fol. 1052] in half pints than a quart of milk, than one quart of milk?

The Court: I think that is outside of the scope of the direct examination. This witness is an economist and not a dealer or producer of milk.

By Mr. Bergson:

Q. Addressing yourself to Table 101 and chart 102, I take it that all of these figures are 100 per cent to Federal installations in the District of Columbia?

A. Yes, sir.

Q. And they do not include District of Columbia institutional bids, such as schools, hospitals and so forth?

A. That is correct.

The Court: I think it would be useful to know this, and perhaps Mr. Saunders can enlighten us: When you refer to Government installations, do you refer to Federal installations or D. C. institutions like the D. C. jail, Occoquan, the D. C. General Hospital?

Mr. Saunders: I have referred throughout to Federal installations. I may explain why.

The Court: Do the D. C. installations confine themselves to D. C. licensed milk?

Mr. Saunders: D. C. licensed milk. The Federal Government does not.

[fol. 1053] The Court: In other words, the patient in D. C. General Hospital and Freedman's Hospital gets better milk than the people in Walter Reed, for instance?

Mr. Saunders: I think that would depend on whose milk they are getting and when, Your Honor.

The Court: Milk may be equally good but it is not required to meet the same rigid requirements?

Mr. Saunders: Not as compared with Federal and D. C. installations.

Mr. Bergson: But when the D. C. institutions get the bids, it is the same kind of milk.

The Court: I think this is far afield. After all, you know, this has been extremely interesting to me as a citizen, but I am just wondering whether it has any effect on the case.

Mr. Bergson: One of the things, Your Honor, that I am attempting to demonstrate is that the plaintiff has taken the market and varied the market wherever possible to secure the best possible figures to prove its case.

The Court: Of course, I want to give you every opportunity to proceed in your own way. I was just wondering

whether those points could not be made more effectively and with less consummation of time in a summing-up argument. However, lawyers like to cross examine witnesses [fol. 1054] and, to a certain extent, I do not think the Court should interfere with that.

Mr. Bergson: Of course, Your Honor, there is also the little problem of the record.

The Court: I must say that what you must do to help the Court is to make a skeletonized discussion of points in the summing-up argument and that is much more helpful to the Court than making them in cross examination. However, you may proceed.

At this time, we will take our usual mid-afternoon recess.

(Thereupon, at 3:00 o'clock p.m., a brief recess was taken.)

[fol. 1055] The Court: Do you have much more, Mr. Bergson?

Mr. Bergson: Four or five minutes, your Honor, I think; certainly no longer.

The Court: Very well.

By Mr. Bergson:

Q. Addressing yourself to plaintiff's Exhibit 103, which shows the dollar value of estimated requirements of fluid milk of Federal installations in the Washington metropolitan area, what percentage of total sales of fluid milk in the Washington metropolitan area do those figures represent?

A. I do not think I know.

Q. Would they be as much as five per cent?

A. I don't know what the total dollar value in the market is.

Q. Now, addressing yourself to exhibit No. 107, which shows percentage of estimated requirements in the Washington metropolitan area awarded to Embassy, Wakefield and Richfield, before the acquisition of Embassy total number of quarts in 1954 were how many?

The Court: Well, the chart speaks for itself, doesn't it?

Mr. Bergson: Yes, I believe it does.

[fol. 1056] The Court: Very well.

By Mr. Bergson:

Q. Does the chart show a fairly constant volume of sales by Embassy Dairy to Federal installations in the Washington metropolitan area for the period 1953 to 1957, not on a relative basis but on an actual basis?

A. On the actual basis, yes.

Q. Now, Plaintiff's Exhibit 108, "Prices for Washington Metropolitan Area." What was the price in July, 1954?

A. It was $5.99 per hundredweight from July 1 through July 15 and then it became $6.22 on July 16th.

Q. Are you reading the same chart? Oh, that is right. Now, what was the figure per hundredweight from May, 1953 through April of '62?

The Court: From May, 1953 until when?

Mr. Bergson: April of 1954.

The Court: The exhibit speaks for itself.

By Mr. Bergson:

Q. Is there any substantial change in pricing of milk in the Washington metropolitan area prior to the Embassy acquisition and after the Embassy acquisition?

A. No substantial change.

[fol. 1057] Q. The only change is seasonal adjustment downward?

A. You had a seasonal adjustment downward just before the acquisition and you again had a seasonal adjustment downward in 1955 and 1956.

Q. Now, is Frederick-Hagerstown in the Washington metropolitan area?

The Court: I think the Court will take judicial notice of the fact that it is not. I understood that Montgomery and Prince Georges Counties are the only parts of Maryland that are in the Washington metropolitan area. Is that correct?

Mr. Bergson: That is right, your Honor. The thing that mystifies me is that these areas change in accordance with the chart, the prices change in accordance with the chart.

The Court: The Washington metropolitan area is the District of Columbia, Montgomery County, Prince Georges County and Arlington and Fairfax Counties and the City of Alexandria.

Mr. Bergson: I agree, your Honor, and therefore I can't understand the relevancy—

Mr. Saunders: I object, your Honor. Mr. Bergson is making these comments repeatedly. Mr. Bender can testify [fol. 1058] as to any question—

The Court: There is no jury here.

Mr. Bergson: I am arguing to the Court, Mr. Saunders.

Mr. Saunders: This is not the proper time for argument.

The Court: Let us proceed, gentlemen. Let us finish this up.

Mr. Bergson: I can do that promptly. I am finished.

Mr. Saunders: I have no further questions of the witness, your Honor.

The Court: You may step down.

(Witness excused.)

GOVERNMENT RESTS

The Court (sic): The Government rests, your Honor.

MOTION FOR JUDGMENT AND DENIAL THEREOF

Mr. Bergson: Your Honor, as you well know, there are three dairies involved in this case. The defendant at this time would like to move for judgment in respect to all dairies. I don't want to argue the matter extensively because I know that your Honor would not care to hear argument but I should like to make the motion.

The Court: I think you should make the motion. Motion denied.

[fol. 1059] Mr. Bergson: May I have just a moment to organize—

The Court: Yes, surely. Take whatever time you need.

(Short pause)

The Court: Perhaps counsel for the defendant would like to have a breathing spell. We can recess at this time until tomorrow morning.

Mr. Bergson: I am prepared to start, your Honor, but I think we would just barely get off the ground.

The Court: I think, under the circumstances, it would be sensible to recess until tomorrow morning.

Now tomorrow morning, as is always the case on Friday morning in criminal court, I have some sentences and motions. So I will excuse you gentlemen until 10:30 tomorrow morning.

Mr. Bergson: Thank you, your Honor.

(At 3:25 p.m. the hearing was adjourned until 10:30 a.m. Friday, November 14, 1958.)

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* * * * * * *

[fol. 1068] J. Homer Remsberg.

Direct examination.

By Mr. Bergson:

Q. Now, when did you first hear about the possibility of the Association's acquiring Embassy Dairy?

A. I'd like to lay just a little background, your Honor.

The Court: No, I think you had better leave to counsel the direction of the case and you just answer questions.

The Witness: When I did first—

By Mr. Bergson:

Q. First hear—

A. —hear of the—repeat the question, if you will.

Q. When did you first hear about the proposal to acquire Embassy Dairy?

A. In April, 1954.

Q. Now, how did this possibility come to your attention?

A. The matter of the tremendous surplus was a matter of great concern to all of our producers—

The Court: No; Mr. Remsberg, may I suggest that you just answer counsel's questions. Would you read the ques-
[fol. 1069] tion, please?

(The reporter read the pending question as previously recorded.)

The Witness: It came to my attention through a telephone message when I was called to the telephone from my home out on the farm, from Mr. Hooper.

By Mr. Bergson:

Q. And what did Mr. Hooper tell you at that time?

A. Mr. Hooper said, "You remember in our last conversation when you told me to go and see Mr. Ward, make one more try to see if we couldn't sell him some milk because of our tremendous surplus. I went to him today, talked with him"—

Mr. Saunders: Your Honor, I object now. We are getting into hearsay.

The Court: Objection sustained. I think it is proper for him to say that he first heard of this possibility through a telephone message from Mr. Hooper but the contents of the telephone message are subject to the objection of hearsay.

By Mr. Bergson:

Q. As a result of this telephone message from Mr. Hooper, did you give any instructions to Mr. Hooper?

A. Yes, sir.

[fol. 1070] Q. What were those instructions?

A. To investigate and see what proposal—what the proposal might be, the following day; at the same time send or contact all of our directors and the finance committee to come to a meeting the following day, or the second day from the evening of the conversation.

Q. Now, on the second day after the conversation did the Executive Committee of the Association have a meeting to consider the acquisition of Embassy Dairy?

A. I am not certain on that point.

Q. Did the Finance Committee of the Association have a meeting on that day?

A. My recollection is that the Finance Committee met in the morning of the second day, the same day that the Board was called in. I can be wrong on that.

Q. But your recollection is that the Finance Committee did meet?

A. Yes, sir, definitely.

Q. Are you a member of the Finance Committee?

A. Ex officio. I always sit in and preside at the meetings of the Finance Committee.

Q. In your capacity as Chairman of the Association?

A. As President of the Association.

Q. As President of the Association.

[fol. 1071] Was the acquisition of Embassy Dairy discussed at that Finance Committee meeting?

A. Yes, sir.

Q. What action did the Finance Committee take in respect to the proposed acquisition of Embassy Dairy?

A. To recommend to the Board, subject to further investigation, the purchase of Embassy Dairy.

Q. What was the reason that prompted that action of the Finance Committee?

A. To proceed to purchase the dairy under the conditions of the further investigation, do you mean?

Q. Yes.

A. Well, the recommendation was to purchase the dairy and with further negotiation and investigation to see if we could work out the details, the financing, necessary for such a move.

Q. Do you know why the Finance Committee reached that conclusion?

A. Well, the matter was fully discussed in a great deal of detail with varying differences of opinion, and after looking at it from all angles that we could at that date, particularly, we thought the purchase of the dairy would be a means of moving Class III or surplus milk into Class I or fluid channels and be a great benefit in added [fol. 1072] income to our dairy farmers and members of the Association.

Q. Now, what is Class III Milk?

The Court: Well—

Mr. Bergson: If you are satisfied.

The Court: I wonder whether I might interject a question at this time. How did you expect that purchasing Embassy Dairy would be a means of moving milk from Class III to Class I?

The Witness: The Embassy Dairy, as it was known at that time before it became a Division—Embassy Division of our Association, at that time was not buying any milk or very little milk from the Association and we had approximate figures or knew approximately of the volume of milk going into that dairy, and we had a lot of surplus milk to sell and if we could move this milk from a very much lower price as surplus or Class III to Class I, it would certainly increase the milk checks very much of our members.

The Court: Do you mean that by acquiring Embassy Dairy, you could sell milk to concerns that previously bought from Embassy Dairy and thereby move milk into Class I that you had previously placed in Class III?

The Witness: That is right, we would move milk to the buyers, yes, sir.

[fol. 1073] The Court: Very well; you may proceed.

By Mr. Bergson:

Q. After the Finance Committee's meeting, did the Board of Directors hold a meeting on the same day?

A. Yes, sir.

Q. And what action did the Board of Directors take in regard to the Embassy acquisition?

A. After a great deal of discussion and a split vote in the Board of Directors, because they were not all in favor of it—five, as I recall, voted against it, but the majority voted to accept the recommendation of the Finance Committee.

Q. Did the Board of Directors at that time appoint a committee to conduct negotiations for the acquisition of Embassy Dairy?

A. Yes, my recollection is yes.

Q. At the time that the Board of Directors met did it have before it a written proposal from the then owner of Embassy Dairy?

A. My recollection is at the beginning of the meeting we did not, but during the course of the meeting this proposal arrived and was presented to the meeting, of course, before any action was taken.

Q. Do you recall the date on which the contract to [fol. 1074] acquire Embassy Dairy was signed?

A. May 26, 1954, is my recollection.

Mr. Bergson: At this time—

The Court: The contract is in evidence and I suppose it is dated?

Mr. Bergson: Yes, the contract is in evidence. And at this time I would like to offer in evidence a supplement that was signed at the same time, on May 26. It has been authenticated by the defendant.

The Court: Very well. Let it be admitted.

Mr. Bergson: It is a letter dated May 26, 1954, signed by Mr. Remsberg, in which the Association agrees not to engage in the wholesale and retail distribution of milk in certain areas outside of the Washington metropolitan area, using the name of Embassy Dairy.

(Defendant's Exhibit No. 6 was received in evidence.)

Mr. Bergson: At this time I have a book of exhibits that I think we will offer. It is only a partial list.

The Court: Very well.

By Mr. Bergson:

Q. Mr. Remsberg, when, in the course of the negotiations concerning the acquisition of Embassy Dairy, did you first [fol. 1075] hear of any discussions in regard to Embassy's producers?

A. At the May 26 meeting at the time the contract was signed.

Q. In what context did that discussion arise?

A. It arrived from Mr. James Ward, the president of Embassy Dairy at that time, in which he stated that as a condition of the sale, he wanted to take his—the Embassy shippers at that time, with him to Baltimore, that he was going to concentrate his efforts on building up the Green Spring Dairy in Baltimore, expected to extend that business; his present Embassy shippers were composed of many of his personal friends and it was a supply of milk developed by him through his field men and he wanted to take them all to Baltimore and he would insist that he try to take them to Baltimore if he could.

Q. And what was the Association's attitude in regard to this position of Mr. Ward?

A. We acceded to the request.

Q. Was the Association willing to accept into membership of the Association any Embassy producers who did not wish to go to Baltimore with Mr. Ward?

A. Any or all of them.

Q. Now, after the acquisition of Embassy Dairy by the [fol. 1076] the Association did the Board of Directors of the Association establish any procedure for the operation of the Embassy Division?

A. The Board of Directors authorized me as president to appoint five members of the Board of Directors, in addition to myself, to serve as what we informally call a plant committee to actually operate as a Board of Directors for this new division, the Embassy Division of the Maryland and Virginia Milk Producers Association. In addition, they appointed Mr. William B. Hooper as managing director and with full responsibility to operate Embassy Dairy as a distributing plant, as a division of the Association, and actually at that time his authority was limited only to authorization of the plant committee in regard to capital expenditures. The detailed operation, how that was to be accomplished, was entirely in Mr. Hooper's hands.

Q. Does the plant committee receive operating statements as to how the Embassy Division is doing financially?

A. Oh, yes, this Committee meets, as I say, in effect as a Board of Directors monthly and scrutinizes the operations, hears reports on the plant, and scrutinizes all the financial statements.

Q. Does the plant committee have anything to do with [fol. 1077] the day-to-day sales policies or operation of the dairy?

A. None, whatever.

Q. Of the Division, I should say?

A. None, whatever.

Q. Did these financial statements or reports that you received on a monthly basis show that on an integrated basis, that the Embassy Division was a profitable operation for the Association?

A. Now, I am a farmer. You talk about an integrated basis. Do you mean as a part—

Q. As a part of the composite of the Maryland and Virginia Milk Producers Association?

A. Yes.

Q. Do these reports show whether the operations of the Embassy Dairy Division of the Association are improving as time goes on?

A. Very definitely. Could I ask a question, your Honor?

The Court: Yes.

The Witness: I ask it because I am not sure that my answer to the—not the last question but the one preceding that, fully explains what I meant when I merely said "yes,"—

[fol. 1078] The Court: You may supplement your answer, if you wish.

The Witness: Well, on an integrated basis it definitely was a good and is a good business operation for the Maryland and Virginia Milk Producers Association. The dairy, itself, as a unit—it is possible for the dairy itself as a unit to lose money, and it definitely did, but that is only a means to an end as far as the Association is concerned and if—and this also is a fact—by moving Class III milk into Class I channels by means of the operation of the dairy it meant an increased income of a million or a million and a half dollars a year. So it definitely, from the standpoint of the organization as an integrated operation, was a good proposition and that was the reason for my answering "yes."

Mr. Bergson: Thank you. I am not through but I thank you for that answer.

By Mr. Bergson:

Q. Leaving the Embassy transaction now, Mr. Remsberg, and directing your attention to Richfield-Wakefield Dairies, did the Association purchase the stock of Richfield and Wakefield Dairies in December of 1957?

A. Yes, sir.

Q. Mr. Remsberg, I show you the minutes of a meeting [fol. 1079] of the Plant Committee of November—of Mary-

land and Virginia Milk Producers Association of November 14, 1957.

A. Those are the minutes of that meeting.

The Court: Mr. Bergson, I hope that all these exhibits have been stipulated so that it will not be necessary to consume time—

Mr. Bergson: I am showing it to him for the purpose of refreshing his recollection for the next question. I am going to offer it anyway but they have been stipulated, your Honor.

The Court: I see.

Mr. Saunders: Pardon me. I believe, your Honor, that it should be demonstrated that the witness needs refreshing before the document is shown him.

The Court: I think you are technically correct.

Mr. Bergson: I thought I was saving a little time by doing it this way.

The Court: Let us proceed, gentlemen.

By Mr. Bergson:

Q. At the meeting of the plant committee on November 14, was the subject of the purchase of the stock of Richfield-Wakefield discussed?

A. Yes, sir.

[fol. 1080] Q. And what action did the plant committee take in regard thereto?

A. They decided very reluctantly to purchase, under certain conditions that are stated in the motion.

Q. And what were those conditions?

A. I do not know it, word for word.

The Court: Well, would it not be easier to introduce the minutes in evidence? You have a right to proceed the way you are doing.

Mr. Bergson: I do not want to consume unnecessary time.

The Court: I thought that it would consume less time and be easier to introduce the minutes.

Mr. Bergson: I offer the minutes of the plant committee meeting of November 14, in evidence as Defendant's exhibit 7 and that meeting authorizes the purchase of

Wakefield Model Farms Dairy subject to advice of counsel and limitations known to exist regarding this matter.

The Court: What number is that?

Mr. Bergson: No. 7, your Honor.

The Court: It may be admitted.

(Defendant's Exhibit 7 was received in evidence.)

[fol. 1081] By Mr. Bergson:

Q. Was the recommendation of the plant committee submitted to the Board of Directors at its meeting on November 15?

A. Yes, sir.

Q. And what was the action of the Board of Directors?

A. They approved the recommendation of the plant committee.

Mr. Bergson: I offer in evidence as exhibit 8 the minutes of the meeting of the Board of Directors of Maryland—no, I beg your pardon. As defendant's Exhibit No. 9, and your Honor will note from your copy that on page 3 we have marked the pertinent portions in red.

The Court: Yes. It may be admitted.

(Defendant's Exhibit 9 was received in evidence.)

By Mr. Bergson:

Q. Why did you purchase the stock of Richfield-Wakefield Dairies at that time?

A. Because as a last resort, and we did not want to buy it, but because of their heavy indebtedness to us and as far as we could determine, their financial situation at that time—it resolved itself into a situation where the dairy would apparently have to go into bankruptcy [fol. 1082] and we could only get—we would only get a share of the money that was owing us, or by taking the dairy over, not intending to operate it as a dairy at all but to integrate what business there was left with the Embassy Dairy and making that, because of the increased volume, a more efficient operation, that in time we felt we could work it out with much less loss to the producers than taking no action and letting it go into bankruptcy.

Q. Now, in acquiring the stock of the Embassy Dairy—Richfield-Wakefield Dairies, did you assume the liabilities of those dairies to other creditors?

A. Yes, sir.

Q. And do you know, Mr. Remsberg, whether those debts have been paid off?

A. I think all of them have at this time. We have been gradually paying off from month to month.

Mr. Bergson: I would like to offer in evidence at this time, your Honor, the minutes of the meeting of the Board of Directors of the Maryland and Virginia Milk Producers Association of December 6, 1957, as Exhibit 10, the pertinent parts having been marked in red on page 2.

Mr. Saunders: This document, your Honor, I will object to on the ground that the document contains a good deal of hearsay.

[fol. 1083] The Court: I think, strictly speaking, it does. However, I am going to overrule the objection with this suggestion: That, of course, the fact that somebody said at a meeting that the Richfield-Wakefield Dairy was in a precarious financial position, is not proof of that fact.

Mr. Bergson: Your Honor, we will offer evidence to prove that fact through later witnesses.

(Defendant's Exhibit No. 10 was received in evidence.)

Mr. Bergson: I would like to offer in evidence at this time defendant's exhibit 11, which are defendant's requests for admissions Nos. 135, 136 and 137.

The Court: They may be admitted.

(Defendant's Exhibit No. 11 was received in evidence.)

The Court: Now that, of course, is proof.

Mr. Bergson: I should also like to offer at this time, your Honor, the formal agreement of purchase of the stock of Richfield-Wakefield Dairy, which is dated December 6, 1957 as Defendant's Exhibit No. 12.

The Court: It may be admitted.

(Defendant's Exhibit No. 12 is received in evidence.)

[fol. 1084] Mr. Bergson: No further questions of this witness, your Honor.

Cross examination.

By Mr. Saunders:

Q. Mr. Remsberg, on direct examination you referred to the fact that one of the reasons which motivated the Association to purchase Embassy Dairy was that would move milk to buyers. You meant to say, I am sure, that it would move milk to Embassy, isn't that correct?

A. Well, indirectly to buyers. Directly to Embassy, yes, sir.

Q. You did not mean that there would be any sale of milk accomplished by the acquisition to dealers other than to Embassy?

A. No, sir.

Q. You used the term "buyers." You meant that indirectly after going through to Embassy and being distributed to customers of Embassy, it would get to buyers?

A. Yes, I was thinking of customers to Embassy as being to buyers.

Q. But the actual sale of the Association of milk in fluid utilization that would be accomplished by the acquisition would be to Embassy?

A. To Embassy Division.

[fol. 1085] The Court: Now, just a moment.

The Association cannot sell to itself. Embassy Division was a part of the Association.

Mr. Saunders: I used the word "move," your Honor.

The Court: In answer to the Court's questions the Court understood the witness to say—perhaps I misunderstood him—but, anyway the thing is obvious that by acquiring Embassy Dairy they were able or at least hoped to be able to sell milk to customers who had previously bought from Embassy and those customers would become customers of the Association. That is the way I understood his testimony.

The Witness: That is how I understood your question, sir.

The Court: Yes.

By Mr. Saunders:

Q. You testified, Mr. Remsberg, that Mr. Ward insisted, as a condition of the contract of acquisition, that he be permitted to take independent producers who had been supplying Embassy, with him or to his Baltimore plant?

A. Yes, sir.

Q. Isn't it a fact, Mr. Remsberg, that at one point following the making of that agreement, Mr. Ward sought to withdraw from it?

[fol. 1086] A. You mean sought to withdraw from the entire agreement?

Q. Yes, sir.

A. Yes. I was out of the country at the time and Mr. Hooper called me in Ecuador, Quito, Ecuador, while I was out of the country, and made that statement.

Q. Did you advise Mr. Hooper what to do?

A. I think so, to stick with our agreement.

Q. To insist that the agreement be kept?

A. That is right, the contract signed.

Q. Mr. Remsberg, you testified with respect to the Richfield-Wakefield matter, that is, the acquisition by the Association of the stock of those companies in December of 1957, that the Association did not want to buy it?

A. Correct.

Q. Is it not a fact, Mr. Remsberg, that as early as November, 1954 the Association's Board of Directors considered purchasing Richfield Dairy?

A. Yes, sir.

Q. Because the Association had reason to believe that Richfield might be sold to some other party and that that other party might purchase milk other than from the Association?

[fol. 1087] A. We had a different set of circumstances at that time.

Q. Answer my question yes or no, please, Mr. Remsberg.

A. That we did consider buying it?

Q. For the reason that I have stated.

A. Well, we did consider buying it, yes, sir, at that time.

Q. Was the reason the reason that I have stated in my question to you?

A. At the moment, my recollection is his at the moment, that following our purchase of Embassy our surplus situation was critical.

Q. Was what, sir?

A. Was critical. And we were looking at every situation to move our Class III milk into Class I, and to continue there in that category. If the dairy was sold, of course there was a possibility that buyer may not buy from us and we did want to insure that amount of milk as a market for our producers, yes.

Q. And that possibility was definitely considered by the Board?

A. At that time.

Q. And contributed to the initial decision to undertake the study of the purchase of Richfield in 1954?

[fol. 1088] A. Yes.

* * * * * * *

[fol. 1113] Mr. Bergson: Mr. Cobb.

Thereupon, JACK R. COBB was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Bergson:

Q. Will you state your name and address for the record, Mr. Cobb?

A. Jack R. Cobb; 7300 Yorktown Drive, Towson, Maryland.

Q. What is your occupation, Mr. Cobb?

A. I am Vice-President and Treasurer of the Baltimore Bank for Cooperatives.

Q. What is the Baltimore Bank for Cooperatives?

A. The Baltimore Bank for Cooperatives is a credit institution chartered under the Farm Credit Act of 1933.

Q. Is it an agency of the United States?

A. I understand that the law defines it as an instrumentality of the United States.

The Court: You might bring that out if you want to. Of course, figuratively speaking, the ordinary national bank that is a member of Federal Reserve has been said to be an instrumentality of the United States. You do not mean it in that sense, do you?

[fol. 1114] The Witness: No, Your Honor, as an agency of the United States Government.

The Court: I suppose that will be established without testimony because Government counsel know the facts.

What do you contend is the fact as to that?

Mr. Bergson: I contend that it is.

The Court: I know, but how is it an agency? Is it a corporation whose stock is owned by the Government? What is its exact status?

Mr. Bergson: It is a corporation originally formed in the Farm Credit Administration. In 1954, it was an agency of the Farm Credit Administration. Since that time, it has been made an independent instrumentality with the major portion of the stock owned by the United States and capital furnished by the United States.

The Court: In other words, it is a Government-owned corporation. I think the Court can take judicial notice of that.

Is there any dispute over that, Mr. Saunders?

Mr. Saunders: I think Your Honor can take judicial notice of what it is. I don't know that Mr. Bergson's description is correct.

The Court: I am going to take judicial notice of the fact. For the time being, I take judicial notice of the fact, from [fol. 1115] the facts stated by Mr. Bergson, and if, however, on checking you find the facts to be otherwise, you may call the Court's attention to them, Mr. Saunders. Otherwise, the judicial notice will stand.

Mr. Bergson: I don't like to belabor this point, Your Honor, but we asked an interrogatory of the Government in connection with the Baltimore Bank for Cooperatives and

they refused to answer on the ground that it would force them to divulge information between Government agencies and I will submit for the record that interrogatory and the Government's response.

The Court: I do not think that is necessary. The Court can take judicial notice.

Mr. Saunders: The Government referred to it as an instrumentality, not as an agency of the United States.

The Court: Instrumentality and agency, there are inferences and sometimes those words are used in a figurative sense but if you say it is a Government-owned corporation, that is a different thing.

By Mr. Bergson:

Q. What are the functions of the Baltimore Bank for Cooperatives?

Mr. Saunders: I have to object to the question. I do not understand the relevancy to the trial.

[fol. 1116] The Court: I do because, of course, I have to evaluate objections, in part, at least, from the standpoint of the opening statement. I have indicated by some comments that I have made that I am far from sure that the facts set out in the opening statement show approval by the Secretary of Agriculture in a technical sense. However, I am going to permit the defendant to make its record and then pass upon the substantive rights.

I do not determine substantive rights in connection with the admission or exclusion of evidence.

Mr. Saunders: Then may I inquire, Your Honor, if this line of examination is intended to develop that there was approval given by the Secretary of Agriculture?

The Court: No; do not make any inquiries. Let us proceed with the case.

By Mr. Bergson:

Q. I think the question, Mr. Cobb, was what are the functions of the Baltimore Bank for Cooperatives.

A. The Baltimore Bank for Cooperatives is in the busi-

ness of making loans to eligible farmer cooperatives as defined by the Agricultural Marketing Act.

Q. Where did the Baltimore Bank for Cooperatives originally obtain its funds for making those loans?

A. The Baltimore Bank for Cooperatives was initially [fol. 1117] capitalized by the United States Government.

The Court: The Court has taken judicial notice of all those facts, Mr. Bergson, so that will save you the trouble of proving them.

By Mr. Bergson:

Q. Are there any restrictions on the size of loan that the Baltimore Bank for Cooperatives may make?

A. The law requires the bank to limit what are known as facility loans to 60 per cent of the appraised value of the security. By Administrative regulations, there are other limitations on loans.

The Court: I am going to interrupt, Mr. Bergson, to state that in view of the question raised by Mr. Saunders, and I think it might be helpful for defense counsel to have this thought in mind, that Section 18 of Title 15 of the United States Code, which is Section 7 of the Clayton Act, provides, in its last paragraph, on which I gather you rely, that nothing in this section shall apply to certain transactions and, among these excepted transactions are transactions duly consummated pursuant to authority given by the Secretary of Agriculture under this statutory provision vesting such power in the Secretary.

I think it would help the Court if, at this time and before you proceed, you were in a position to answer the follow-[fol. 1118] ing question:

What statutory provision vests power in the Secretary of Agriculture to approve an acquisition of the kind involved in this trial?

Mr. Bergson: It is our position, Your Honor, that that power is contained in Section 1 of the Capper-Volstead Act and I would just as soon spell out what we intend to prove.

The Court: Suppose you make your offer of proof. What

clause of Section 1 of the Capper-Volstead Act confers this authority in the Secretary of Agriculture?

Mr. Bergson: Section 1 of the Capper-Volstead Act authorizes cooperatives to acquire facilities for handling, processing—

The Court: Yes, I have already held that is limited by Section 7 of the Clayton Act, but if there is any statutory provision vesting in the Secretary of Agriculture the authority to approve transactions, such as involved here, then, of course, you would have a basis to stand on but let us assume that the Secretary of Agriculture even formally approved this transaction. Unless there is a statutory provision vesting power in him to approve such transactions, then the exception in the last paragraph of Section 7 is not applicable.

[fol. 1119] Mr. Bergson: I submit, Your Honor, there is not a single statutory authority authorizing the Secretary of Agriculture to authorize any acquisition and if you take the position that there has to be express statutory authority, the language referring to the Secretary of Agriculture in the last paragraph of Section 7 of the Clayton Act is pure surplusage and it is obvious, from the legislative history of the Clayton Act, that it was not intended to be surplusage.

I cannot point to a specific statute but I can also assure Your Honor that I cannot find any other statute which qualifies the Secretary of Agriculture to approve any kind of acquisition.

The Court: There may be some statute somewhere, for the powers of the Secretary of Agriculture are very complicated and are contained in any number of statutes.

I think you had better make a detailed offer of proof in order to protect the record, so far as you are concerned, but I do not want to spend a day or so, or several hours, taking testimony on a matter which might be totally irrelevant.

Mr. Bergson: I think also, Your Honor, as Colonel Hughes just suggested, that this testimony is relevant in connection with the question of equitable relief in this case in that the Government made the loan that made this

[fol. 1120] acquisition possible. Here we have one agency of the Government making a loan which made the acquisition possible, studying the effect of the acquisition on the market and then we have a coordinate branch of the Government attacking that acquisition.

The Court: You may put all of those facts in your offer of proof and perhaps Mr. Saunders might be willing to stipulate those facts to be true.

Mr. Saunders: Your Honor, there is no question that the Baltimore Bank for Cooperatives made a loan to Maryland-Virginia Milk Producers Association. I will stipulate that fact, the purpose of the loan being to facilitate or enable the Maryland-Virginia Milk Producers Association to acquire assets of Embassy Dairy. Is there any further stipulation you wish in that regard?

The Court: In other words, Mr. Saunders, you are willing to stipulate that the Government loaned the money to the defendant which made the financial arrangement possible for the defendant to acquire the Embassy Dairy, is that it?

Mr. Saunders: As I understand, 60 per cent of the amount.

The Court: Without that 60 per cent, they would have had to get 60 per cent somewhere else, I presume. Very few big business transactions are carried out on a one [fol. 1121] hundred per cent cash basis.

Mr. Bergson: If Your Honor please, I would like to add to this offer of proof, because I do not think the stipulations go far enough.

The Court: Perhaps not, but so far as they go, you do not have to prove that part, anyway.

Mr. Bergson: I would offer to prove, through this witness, that, upon original consultations with the Baltimore Bank for Cooperatives, the officials of the Baltimore Bank for Cooperatives conferred with officials of the Farmers Cooperative Service of the Department of Agriculture; that they obtained written analyses of the proposal from the Department of Agriculture; that they considered the fact that dairy farmer cooperatives all over the country operate retail dairies; that they have acquired retail dairies; that

the loan was made upon the opinion of counsel that the objective of the transaction accomplished the purposes of the Agricultural Marketing Act which is 12 USC 1141.

The Court: I want you to follow this, Mr. Saunders, because I am going to ask you if you will stipulate these facts.

Mr. Bergson: Your Honor, do you wish me, at this time, to make the entire offer of proof on this line of testimony, or just what I intend to prove through this witness?

[fol. 1122] The Court: It might be simpler and not involve too many complications, if you just state what you intend to prove from this witness.

Mr. Bergson: That when the Baltimore Bank for Cooperatives acted upon the application of the Association for the loan, it had before it a detailed memorandum prepared by the Farmers Cooperative Service of the Department of Agriculture which memorandum recommended the granting of the loan and I would like, if Your Honor please, to offer in evidence certain memoranda prepared by officials of the Baltimore Bank for Cooperatives, most of which has already been introduced in this case by the Government.

The Court: Then you do not have to offer them again.

Mr. Bergson: Your Honor, they only offered parts of the document and, in one instance, they offered three pages of an 11-page document and omitted the appendices.

The Court: Very well.

Mr. Saunders, subject to objection as to relevancy, are you willing to stipulate these are the facts that the witness will so testify?

Mr. Saunders: May I confer with counsel for a moment, Your Honor?

The Court: Yes, indeed.

[fol. 1123] (Thereupon, counsel conferred.)

Mr. Saunders: Your Honor, I will stipulate that is substantially correct.

The Court: I do not want the word "substantially".

Mr. Saunders: If Mr. Bergson would break it down piece by piece, I could follow it better.

The Court: No. I want you to stipulate it all unless you

know something that is wrong with it. That is why I asked you to follow it carefully when Mr. Bergson was stating his offer of proof.

Mr. Saunders: I was trying to follow it to the best of my ability.

I will stipulate to that, with this proviso, that there was no finding by the bank that this acquisition or the making of the loan to make the acquisition was in the public interest as contrasted with the interest of the cooperative or the Bank.

The Court: I do not think the bank has to make a finding that the making of the loan was in the public interest.

Mr. Bergson: I would not admit that, anyway.

The Court: Very well, you admit that?

Mr. Bergson: I will not admit that.

The Court: But you stipulate everything that is in Mr. [fol. 1124] Bergson's offer?

Mr. Saunders: May I have a few moments, Your Honor?

The Court: We will take our usual mid-afternoon recess at this time, but, before we do this, I want Government counsel to cooperate by stipulating a lot of necessary facts.

Mr. Saunders: I think we can, Your Honor.

(Thereupon, a short recess was taken.)

[fol. 1125] The Court: I understood from the clerk that you gentlemen wanted a little extra time during the recess.

Mr. Saunders: Thank you, your Honor.

Your Honor, counsel have discussed this matter in the recess, and have come to this conclusion, that the facts which Mr. Bergson requested be admitted by the Government are true if a qualification is placed upon what might not be too clear.

The Court: I did not get that last.

Mr. Saunders: I say, the facts stated by Mr. Bergson are true with this qualification—which Mr. Bergson admits is the fact—that, while there were conferences between representatives of the Baltimore Bank and persons in the Department of Agriculture, only one document, one written communication, passed from the Department of Agriculture to the bank. It was a letter from the Chief of the

Dairy Branch of the Farmer Cooperative Service to the Baltimore Bank for Cooperatives dated June 8, 1954.

The stipulation is limited to this as being the only written communication.

In addition, for the purposes of completing the stipulation, there is offered as Plaintiff's Exhibit No. 114, a document which has been marked as plaintiff's Exhibit No. [fol. 1126] 114 for identification with attachments. This is a letter signed by the president of the Baltimore Bank for Cooperatives dated September 18, 1958, addressed to the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice. It is a document not previously introduced, your Honor. In this document questions put to the bank by the Department of Justice concerning what the bank did in this connection are answered by the bank.

The Court: Very well.

(Government Exhibit No. 114 was received in evidence.)

Mr. Bergson: In order to complete this proffer of proof—

The Court: It is no longer a proffer, it is evidence, because it is stipulated.

Mr. Bergson: Defendant's Exhibit 18, which is the application for the loan to the Baltimore Bank for Cooperatives, Defendant's Exhibit 19, which is the complete document corresponding to Government's Exhibit 27, Defendant's Exhibit 20, a letter dated June 23, 1954 from the Assistant Treasurer of the Baltimore Bank for Cooperatives to the Secretary-Treasurer of the Maryland and Virginia Milk Producers Association—

[fol. 1127] Mr. Saunders: May I have the document back from the Court for a moment, your Honor? I think the document Mr. Bergson is now referring to is attached to that document.

Mr. Bergson: I did not know that.

The Court: If you put it in twice, it would not hurt anybody. I think, rather than consume time finding out if it is there, just put it in a second time.

Mr. Bergson: To which is annexed the loan agreement.
The Court: Very well.
Mr. Bergson: And Defendant's Exhibit 21, which is a letter from the treasurer of the Baltimore Bank for Cooperatives addressed to the Assistant Secretary-Treasurer of the Maryland and Virginia Milk Producers Association, enclosing copies of two deeds of trust and mortgage notes which are attached.

(Defendants' Exhibits 18, 19, 20, and 21 are received in evidence.)

Mr. Bergson: I just have one question to ask this witness, which has no relation to the offer of proof or the stipulation.
The Court: Very well.

[fol. 1128] By Mr. Bergson:

Q. Mr. Cobb, the Government, in its case, introduced in evidence portions of a memorandum dated May 17, 1954, which was made by John B. Jones, Secretary of the Baltimore Bank for Cooperatives. This is Government's Exhibit 26. I ask you to look at the second postscript to that memorandum and ask you whether Mr. Hooper and Mr. Derrick, when they assured you that the proposal was known to other milk distributors in Washington and had not met with objection from those quarters, stated to you that they had discussed this matter with those distributors?
A. I have no recollection that they did.

Mr. Bergson: That is all. Thank you.
Mr. Saunders: No questions, your Honor.
The Court: You may step down.

(Witness excused.)

The Court: I am going to call attention of counsel for both sides to the case of Wisconsin Central Railroad vs. United States, 164 U.S. 190. Of course, that is a case well known to every lawyer who has had anything to do with Government litigation and no doubt is known to both of

you but I just want to remind you of it. That is a case that stands for the fundamental proposition that the Government cannot be estopped or bound by the action of its [fol. 1129] officers in making representations or statements or something of that sort.

You may proceed, Mr. Bergson.

Mr. Bergson: Your Honor, my next witness is Mr. Hooper, who is the manager of the Association. He will be a long witness and I wondered, in view of the hour, whether you would like me to—

The Court: We will start him for a few minutes. In order that we might map out a schedule—and I am not trying to hurry anyone, but it would be helpful to have an estimate—about how long do you expect to take?

Mr. Bergson: I would guess, your Honor, that we could finish sometime Tuesday.

The Court: I would have thought so, too, or perhaps Monday, because generally cases do not take as long as counsel anticipate.

You will not have a very long rebuttal, I presume?

Mr. Saunders: I don't anticipate it at this time, Your Honor.

The Court: Very well. I might say at this time that of course I shall welcome an oral argument. However, in view of the fact that the issues now at this trial are much narrower than they were at the trial on the first cause of [fol. 1130] action, I do not expect and I would not be helped by a long argument. I think about an hour on each side would be sufficient. I particularly would be helped by Government counsel if Government counsel, in their summing up, will bring together the evidence, especially that which is contained in the admissions. So much of the case is admissions and answers to interrogatories and the Court would be much more helped by that, which perhaps is a prosaic thing to do, than it would be by an eloquent speech.

You may proceed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 62

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., APPELLANT,

vs.

UNITED STATES.

No. 73

UNITED STATES, APPELLANT,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Thereupon WILLIAM B. HOOPER was called as a witness and having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Bergson:

Q. Mr. Hooper, will you please state your name, address and occupation for the record?

A. My name is William B. Hooper, H-o-o-p-e-r. I live at 609 Lakeview Drive, Falls Church, Virginia.

I am general manager and secretary-treasurer of the Maryland and Virginia Milk Producers Association, Incorporated.

Q. I think this is already in the record but I had better [fol. 1131] ask you how long you have been employed by the Association.

The Court: He has testified before. That is all in the record.

Mr. Bergson: Yes.

By Mr. Bergson:

Q. Directing your attention to the early months of 1954, Mr. Hooper, did the Association have a problem regarding surplus milk?

A. Yes, sir, it did.

Q. Would you please define surplus milk?

A. Surplus milk is a term generally used in the industry as well as in the Federal Orders, Federal Marketing Orders, to describe that milk which is produced in a given market in excess of the fluid requirements of the dealers and processors, fluid processors in a given market.

Q. Now, what effect does the existence of a surplus have on the price that is paid to the farmers for their milk?

A. It has a direct depressing effect.

Q. Would you explain how?

A. Yes, sir. The farmers' price in any market where the classified plan is in use is a blend or an average of all the prices received for the various classes of milk.

[fol. 1132] In other words, Class I, II and III. Class III is generally the designation of surplus. Now, the more milk

that is utilized in the lowest class, the lower the price would be. The less milk utilized in the lower class, the higher the farmers' return would be.

Q. Now, does the price that the Association pays to its farmers have any effect on the price that is paid to independent suppliers or producers on this market?

A. Yes, sir, it does. Generally with minor variations, the blend price paid to the Association members is the basis on which the independent producer is paid. In other words, as the Association member price goes down, the non-member price goes down accordingly.

Q. And, as the Association member's price goes up, the non-member's price goes up accordingly?

A. Yes, sir, it does.

Q. Now, in the early months of 1954 what steps did the Association take to ease this problem of surplus milk?

A. The word "ease" I don't think would be correct, but the Association took various steps to try to get a better return from surplus and to utilize surplus in other than the lowest price categories, such as we instituted a vigorous advertising campaign appropriating approximately $100,000 [fol. 1133] for that purpose. That was for a year to advertise the merits of milk and try to stimulate consumption. We purchased outright and put out among the various distributors in the market vending machines, hoping to capture a part of the impulse buying in the market. In other words, vending machines had done a tremendous job with other commodities. The Association purchased 60 vending machines and put them among the distributors on the basis that they could buy them on a use basis.

In other words, as they used them, they paid proportionately, sort of a lease-purchase deal. Some of those machines are still in use by some of the dairies in the market.

We also tried to sell our surplus milk in other markets. We contacted South Carolina, North Carolina, North Dakota, various other places to see if they had a need for fluid milk. It just happens that most of them were fairly well supplied and there was not much demand for it.

We also studied the possibilities of a Federal Order—

Mr. Saunders: May I interrupt, your Honor? I wanted to give counsel and the witness a fair amount of leeway

but at this point I think we can shorten proceedings considerably because I don't understand the relevancy of this [fol. 1134] testimony. There is no question but that the Government will concede that the Association in undertaking this acquisition was trying to maximize returns to its members, but the business justification, as your Honor has previously noted this afternoon, is of no relevance in determining the issues of the trial.

The Court: I am going to let the defense make its record. I am going to overrule the objection.

Mr. Bergson: I am not going to belabor this much, your Honor, anyway.

The Court: I think each side has a right to present its contentions from its point of view.

By Mr. Bergson:

Q. Now, do you recall, Mr. Hooper, what the average blend price that the Association was paying to its producers in 1953 was?

A. The average blend price paid to producers for 3.5 per cent milk in 1953 was $5.68 per hundredweight.

Q. And what was that for January of 1954?

A. I believe, Mr. Bergson, it was $4.98.

Q. In February?

A. I am not sure of that price but it was less than $4.98.

Q. In March?

[fol. 1135] A. I know March. It was $4.78. That represented approximately 8 cents a gallon decrease to the producers.

Q. Now, in your efforts to dispose of this surplus milk, did you lower the Class I price?

A. No, sir, we did not.

Q. Why didn't you?

A. Experience had shown us over the years, sir, that a relatively small movement in the price of milk has no effect whatsoever on the buying habits of the public. And by "relatively small," I am talking within two cents a quart. It doesn't stimulate it at all.

Q. But if the price to the consumer were reduced two cents a quart, how much would the price to the producer be reduced?

A. That would have reduced the price to the producer—I am making a mental calculation if you will bear with me a second—about 50 cents a hundredweight at that time. That would have meant, in total dollars, about $300,000 a month to the farmers.

The Court: Mr. Hooper, in order that I might visualize your answer, just how much milk is a hundredweight? Say, in pints and quarts, because that is the only way I can understand liquid—

The Witness: Your Honor, there are 11.6 gallons or 46.25 [fol. 1136] quarts in a hundred pounds of milk. For all practical purposes you can calculate 46 quarts.

The Court: I see.

By Mr. Bergson:

Q. Now, directing your attention to the month of April, 1954, did you pay a call on Mr. James J. Ward, president of Embassy Dairy?

A. Yes, sir, I did.

The Court: Now, Mr. Bergson, this might be a good time to suspend for the day because you are opening up a new subject.

We will recess until ten o'clock on Monday morning.

Mr. Bergson: Thank you, your Honor.

(Whereupon, at 3:45 p.m. the hearing was adjourned until 10 o'clock Monday, November 17, 1958.)

[fol. 1140] PROCEEDINGS

Deputy Clerk: United States vs. Maryland and Virginia Milk Producers Association.

The Court: We are running a little behind schedule. Due to the recess of yesterday, we had two days' calendar to call and go through.

Mr. Bergson: It must be an extremely difficult task to handle so many various and diffuse matters so promptly, your Honor.

As we closed last Friday, Mr. Hooper was on the stand, if you will recall, your Honor.

The Court: Yes.

Mr. Bergson: And I would like to recall him now.
The Court: You may proceed.

Thereupon WILLIAM B. HOOPER a witness, having been previously sworn, resumed his testimony further as follows:

Direct examination (continued).

Mr. Bergson: While Mr. Hooper was testifying on Friday, you will recall he was discussing the surplus problem that the Association was faced with in the spring of 1954. At this time I would like to offer in evidence as Defendant's Exhibit 9 the minutes of the meeting of the Board of Direc-
[fol. 1141] tors of Maryland and Virginia Milk Producers Association.

Deputy Clerk: That is in evidence.

Mr. Bergson: No, this is exhibit 22. It is the minutes of April 9.

Your Honor, you do not have this in your book.

The Court: Just give it to the clerk. I have Defendant's Exhibit No. 9.

Mr. Bergson: No, it is defendant's exhibit No. 22.

The Court: I thought you said Defendant's Exhibit 9.

Mr. Bergson: If I did, I misspoke myself.

The Court: Is this a binder for the Court?

Mr. Bergson: That is a binder for the Court, yes.

Deputy Clerk: What is the date of the minutes, again?

Mr. Bergson: April 9, 1954. And I invite your Honor's attention to the portion marked in red on page 4.

The Court: Very well.

Mr. Saunders: Your Honor, I object to the admissibility of this document on the ground that it contains a good deal of hearsay and Mr. Bergson has not shown that the witness can not testify as to the matters that are pertinent from his own recollection.

The Court: This document is admitted, not as proof of the facts therein stated, but as proof of what transpired
[fol. 1142] at the meeting.

Mr. Saunders: I think it is still hearsay, your Honor.

The Court: No, it is not hearsay for that purpose. The objection is overruled.

(Defendant's Exhibit No. 22 was marked for identification and received in evidence.)

By Mr. Bergson:

Q. Mr. Hooper, on April 9, 1954, did the Board of Directors of the Maryland and Virginia Milk Producers Association discuss the possibility of applying for a Federal Marketing Order—

The Court: I have overruled the objection so the minutes are in evidence.

Mr. Bergson: I thought you said, your Honor, that it was just for proof of what happened at the Board of Directors' meeting.

The Court: Precisely. And your question is directed to the same thing, as to what happened at the Board of Directors' meeting.

Mr. Bergson: Frankly, I think the minutes, which are offered solely for the purpose of showing an action taken by the Board, is admissible for all purposes.

The Court: Well, I think it is admissible as proof of [fol. 1143] the action taken by the Board but it is not admissible as proof of the truth of some statement made at the meeting. That was the significance of my qualification.

Mr. Bergson: Now that I understand your Honor's ruling, there is no need for me to ask the question.

The Court: I do not think there is.

By Mr. Bergson:

Q. Mr. Hooper, in April, 1954 did you pay a visit to James J. Ward, president of Embassy Dairy, Inc.?

A. Yes, sir, I did.

Q. On what date?

A. April 12.

Q. Why did you go to see Mr. Ward?

A. I went to see Mr. Ward with the purpose of trying to sell him some of our surplus milk to use in his operations.

Q. At the time you went to see Mr. Ward did you know that the Harvey Dairy had been sold?

A. Yes, sir; I did.

Q. Where had the Harvey Dairy been buying its milk at that time?

A. From the producers who were members of the Maryland and Virginia Milk Producers Association.

Q. How much milk was Harvey Dairy purchasing from [fol. 1144] the Association at that time?

A. Approximately six thousand gallons per day.

Q. Did you expect to retain those sales for the Association?

A. No, sir, we did not.

Q. Do you know who the purchasers of Harvey Dairy were?

A. Yes, sir, I do.

Q. Who were they?

A. They were a Mr. Dave Shank, who was manager of the Valley Virginia Cooperative Milk Producers at Harrisonburg, Virginia, and Mr. Ralph Torreyson, who had been in the milk brokerage business in Washington.

Q. Now, what did you discuss at the meeting with Mr. Ward?

A. We discussed the surplus of the Association; the fact that Mr. Ward found it necessary to buy considerable quantities of milk to supplement his regular producers; that I offered him the milk of the Association; we discussed the matter of steps that would have to be taken in the market to alleviate the surplus problem, and discussed the matter of the Association considering application for a Federal Order.

Q. Was Mr. Ward disposed to purchase milk from the [fol. 1145] Association?

A. Not on the terms that we sell the other dealers; no, sir.

Q. Now, did anything else take place at that meeting?

A. Yes, it did.

Q. What was that?

A. Mr. Ward mentioned the fact that he was not well, that he was rather dissatisfied with some of his other operations, particularly his Baltimore operation; that he did

not think anyone wanted a Federal Order and suggested—and I think I can quote—"the simplest thing would probably be to buy me out."

Q. For the Association to buy him out?

A. Yes, sir.

Q. What was your response to Mr. Ward's suggestion?

A. I think I told Mr. Ward that it was a very interesting suggestion and I was very much interested but I had no authority to pass on such a thing but I certainly would refer it to our Board of Directors and I asked him about how much he wanted for the dairy.

Q. Did he state how much he wanted for the dairy?

A. Yes, sir; he said about $3 million was his figure.

Q. Did he make any other statement with regard to his proposal to sell Embassy Dairy?

[fol. 1146] A. The only statement that he made—that if we were interested, he would like action to be taken as soon as possible; that, for two reasons, one, he was leaving for Florida, and the second was that, when things of this kind were generally discussed, why, it got around and could hurt his business and he said this would have to be kept in utmost secrecy.

Q. What did you do after you left Mr. Ward?

The Court: Well, this might be a convenient time to take our usual midmorning recess.

(A brief recess was taken.)

The Court: You may proceed.

By Mr. Bergson:

Q. Mr. Hooper, as we adjourned for the morning recess, I was about to ask you, and I now ask you, what you did after you left Mr. Ward on the 12th of April, 1954.

A. I called Mr. Homer Remsberg, our president, and told him of our conversation and asked him what he thought we should do. At that time I recommended to Mr. Remsberg that immediate consideration be given to Mr. Ward and he authorized me to call a special board meeting.

Q. For any particular date?

A. Yes, sir, for two days later. That was April 14. And the directors were called by telephone.

[fol. 1147] The Witness: Your Honor, in the event my voice isn't as clear as it could be—I have had a cold and the virus hit me yesterday and apparently got in my throat.

The Court: There are a lot of colds going around this city at this time.

The Witness: I will try and keep it as clear as possible.

The Court: It is clear enough; perfectly clear.

By Mr. Bergson:

Q. Did you follow out Mr. Remsberg's instructions?

A. Yes, sir, I did.

Q. And was there a meeting held by the Finance Committee of the Board of Directors on April 14?

The Court: Mr. Bergson, Mr. Remsberg has already testified concerning those meetings and you have already offered the minutes.

Mr. Bergson: I haven't offered them yet, your Honor. I expected to offer them through Mr. Hooper.

The Court: I see.

Mr. Bergson: I can cover this ground very rapidly anyway.

The Court: Very well.

The Witness: Yes, sir, the Finance Committee met in the morning.

[fol. 1148] By Mr. Bergson:

Q. What action did the Finance Committee take?

A. They recommended to the full board acceptance of Mr. Ward's proposal.

Q. Was there a subsequent meeting of the board on that day?

A. Yes, sir; the board met in the afternoon to consider the Finance Committee's recommendations.

Q. At the time the board met, had you received Mr. Ward's proposal in writing?

A. Yes, sir; we had.

Q. When did you receive it?

A. At some time prior to the convening of the Board of Directors.

Q. I show you a document entitled "Proposed Sale of Certain Assets of Embassy Dairy, Inc.," and ask you if that is the document that you received on April 14 from Mr. Ward?

A. Yes, sir; it is.

Mr. Bergson: I offer in evidence Defendant's Exhibit 24, the proposed sale—the document entitled "Proposed Sale of Certain Assets of Embassy Dairy, Inc."

The Court: It may be admitted.

(Defendant's Exhibit 24 is received in evidence.)

[fol. 1149] By Mr. Bergson:

Q. What action was taken by the Board of Directors?

A. The Board of Directors approved the recommendation of the Finance Committee and instructed management to work toward consummation of an agreement or a purchase of the dairy.

Q. Subsequent to the meeting of the Board of Directors was there a further meeting by a committee of directors?

A. Yes, sir; there was a joint meeting of the Executive Committee and the Finance Committee.

Q. Was there any discussions at any of these meetings on the 14th of April in regard to Embassy shippers?

A. No, sir; there was not.

Q. Was there any discussion about the value of good will that was being acquired?

A. Yes, sir; there was.

Q. What was that discussion?

A. The Board asked me my estimate as to what the real assets were, the property values, and so forth, and how much would be allocated to good will. I told them at that time that my estimate was that about $1 million would be allocated or attributable to good will.

The Court: Did you say $1 million?

The Witness: $1 million; yes, sir.

[fol. 1150] Mr. Bergson: I now offer in evidence as Defendant's Exhibit 23, the meeting of the Finance Committee of April 14, 1954 of the Maryland and Virginia Milk Producers Association. I now offer in evidence as Defendant's

Exhibit No. 25 the Board of Directors' meetings of April 14, 1954; I offer in evidence as Defendant's Exhibit No. 26 the minutes of April 14 of the meeting of the Executive and Finance Committees of the Maryland and Virginia Milk Producers Association.

The Court: They may all be admitted.

(Defendant's Exhibits Nos. 23, 25 and 26 were received into evidence.)

The Court: If you will just suspend a moment.

(A brief pause.)

The Court: Very well, you may proceed.

Mr. Bergson: Your Honor, directing your attention to defendant's exhibit No. 24 which is the proposal from Mr. Ward, I invite your attention to the fact that there is no mention made of producers in that proposal.

The Court: Yes.

By Mr. Bergson:

Q. In your efforts to obtain financing, did you contact officials of the Baltimore Bank for Cooperatives?

A. Yes, sir; I did.

[fol. 1151] Q. Did you at any time prior to the signing of the contract of sale of May 26, 1954, discuss with any distributor in the Washington market the proposed acquisition by the Association of Embassy Dairy?

A. No, sir; I did not.

Q. I call your attention now to Government's Exhibit No. 26, and show you footnote No. 2, and ask you to read it.

(Short pause.)

A. Yes, sir; I have read it.

Mr. Bergson: Do you have that, your Honor?

The Court: Which page is the footnote on?

Mr. Bergson: It is on the third page, your Honor.

The Court: I see it now.

Mr. Bergson: It is a "P. S." rather than a footnote.

The Court: I see; a postscript.

Mr. Bergson: Right.

By Mr. Bergson:

Q. Did you make that statement to officials of the Baltimore Bank for Cooperatives?

A. No, sir; I made no statement as such.

Q. What did you state at that time?

A. In general discussion it is perfectly possible that the question of whether or not the contemplated purchase was known to distributors in the market. I know of my per- [fol. 1152] sonal knowledge that there were many rumors floating around the market at that time. I assumed that the distributors in the market were aware of these rumors. I told the Bank of Cooperatives that. Furthermore, I told them that I had received no call objecting to the Association's purchase of Embassy Dairy and, therefore, assumed that there were no objections.

Q. Now, prior to the purchase, did the Board of Directors visit the plant of Embassy Dairy?

A. Yes, sir; they did.

Q. And after such inspection of the plant, did the Board take any action in regard to the proposed sale?

A. Yes, sir; they instructed management to conclude the agreement to purchase.

Mr. Bergson: I now offer in evidence as Defendant's Exhibit 27 the minutes of the meeting of the Board of Directors of Maryland and Virginia Milk Producers Association of May 14, 1954. I invite your Honor's attention to the parts marked in red on pages 1 and 2.

The Court: Very well. Let it be admitted.

(Defendant's Exhibit No. 27 was marked and received in evidence.)

By Mr. Bergson:

Q. Did the Board of Directors of the Maryland and [fol. 1153] Virginia Milk Producers Association meet on the day on which the contract of May 26 was signed?

A. Yes, sir; they did.

Q. At that meeting was the manner of financing the Embassy purchase discussed?

A. Yes, sir; in detail.

Q. At that meeting was the method of retiring the debt for the acquisition of Embassy Dairy discussed?

A. Yes, sir; it was.

Q. Was a formula set up at that meeting?

A. Yes, sir; a formula was set up whereby the difference between the price that producers would have received for the milk, that is, by the milk going into Class III or surplus, and what it would bring going through the dairy, that difference was to be set aside and used for repayment of indebtedness and producers were to be given certificates attesting to that set aside.

Mr. Bergson: I now offer in evidence as Defendant's Exhibit 28 the meeting of the Maryland and Virginia Milk Producers Association—minutes of directors' meeting of May 26, 1954, and I invite your Honor's attention to the portions of the minutes appearing on pages 2, 3 and 4.

The Court: I do not see 20-A in this binder.

Mr. Bergson: 28, sir.

[fol. 1154] The Court: I beg your pardon. I thought you said 20-A. That was my mistake. Very well.

(Defendant's Exhibit No. 28 was received in evidence.)

By Mr. Bergson:

Q. Now, Mr. Hooper, why did the Association purchase Embassy Dairy?

A. The Association purchased Embassy Dairy as an outlet for surplus milk to be moved from surplus milk into fluid channels.

Q. Would that result in moving milk from a lower classification into a higher classification?

A. Yes, sir; that was the purpose.

Q. Do you recall the price of the Class III milk at that time?

A. Not precisely, but it was around $2.75.

Q. And the Class I milk?

A. The Class I milk, including quality premiums, would average about $6.62 per hundredweight.

Q. And Class II?

A. Class II was about $3.10.

Mr. Bergson: I now offer in evidence as Defendant's exhibit 29 a document entitled "Memorandum-Purchase of the Embassy Dairy by the Maryland and Virginia Milk Producers Association, dated July 15, 1954" and I invite [fol. 1155] your Honor's attention to Roman Numeral I appearing on page 2.

The Court: For whom was this memorandum prepared and by whom? The Court observes that it is unsigned and is not directed to anyone.

Mr. Bergson: The memorandum was prepared by the management of the Association for the membership of the Association. The document has been authenticated by the Government.

The Court: Very well.

(Defendant's Exhibit No. 29 was received in evidence.)

By Mr. Bergson:

Q. Now, in your discussions with the officials of the Baltimore Bank for Cooperatives did you give them an estimate as to the number of Embassy shippers whom you thought would join the Association?

A. Yes, sir; I did. I told them I thought between 60 and 70 of the Embassy shippers would become members of the Association.

Q. Now, at any time prior—

The Court: May I interrupt with a question at this time?

Mr. Bergson: Surely.

The Court: Would you have been willing to buy milk [fol. 1156] from any farmer or producer who would not join the Association?

The Witness: Yes, sir. We, at the present time, buy milk from producers who are not members of the Association as such.

The Court: You may proceed, Mr. Bergson.

By Mr. Bergson:

[fol. 1209] Mr. Bergson: I offer in evidence, as Defendant's Exhibit 49, an audit entitled, "Simpson Brothers, Inc., Wakefield Model Farms Dairy, September 30, 1957."

The Court: It may be admitted.

(Thereupon, Statement entitled Simpson Bros. Inc., Wakefield Model Farms Dairy, dated Sept. 30, 1957, was marked Defendant's Exhibit No. 49, for identification and received in evidence.)

Mr. Bergson: That completes my examination of Mr. Hooper, Your Honor.

Cross examination.

By Mr. Saunders:

Q. Mr. Hooper, on direct examination you testified, I believe, that information obtained from the audits of your dealers does not reflect the prices that they bid for obtaining contracts from the Federal Government. Did you mean to say that, sir?

A. Yes, sir.

Q. I show you a document, Plaintiff's Exhibit 65, a contract which says, "Analysis for Richfield Dairy for the month of April, 1954" from the Association's files. I ask you, Mr. Hooper, whether these small figures opposite the quantities under quarts, pints, and the like, are not the prices charged the Government by Richfield?

[fol. 1210] A. I do not know. It is not normal procedure, Mr. Saunders, to show the prices on individual contracts and it is not necessary. It is a matter of public knowledge to anybody who wants it.

Q. Who made this particular document, Mr. Hooper?

A. It looks like an auditor of ours by the name of Smith.

The Court: Is Exhibit 65 in evidence?

Mr. Saunders: Yes, Your Honor. I am referring to the small figures.

The Court: I understand, but I just wanted to be sure whether the exhibit has been received in evidence.

Mr. Saunders: It has been received. I am referring to the small figures.

The Court: Yes, I understand what you are referring to. I see the small figures.

Mr. Saunders: I ask that this be marked Government's Exhibit, for identification, No. 115.

(Thereupon, Table of Blend prices received by members of the Association was marked Government's Exhibit No. 115, for identification.)

By Mr. Saunders:

Q. I show you now, Mr. Hooper, a document which has been marked as Plaintiff's Exhibit, for identification, No. [fol. 1211] 115, and I ask you whether or not that document, Mr. Hooper, is a Table of Blend prices received by members of your Association which table was submitted to the Department of Agriculture in connection with an application for a Federal Marketing Order.

A. Of my personal knowledge, Mr. Saunders, I would not know.

Q. I ask you, Mr. Hooper, if you recognize this document which I place before you.

The Court: Is Government's Exhibit 115, for identification, one of the documents that was stipulated?

Mr. Saunders: No, Your Honor. This is because of a matter raised on direct examination which has not been previously stipulated.

The Court: Very well.

The Witness: Mr. Saunders, I am trying to answer your question as best I can.

I do not, as a rule, ever see these. This type of thing, statistical tables and statistical economic data, go into the record for a hearing before the Department of Agriculture and are prepared by our economist and statistician and I just never see them. If these were taken from one of our exhibits, I will certainly say, yes, but I don't know personally.

[fol. 1212] Mr. Saunders: Perhaps we can expedite this matter, Your Honor, by a stipulation that Government's Exhibit 115 is Table 26 from the documents submitted by the Association.

Mr. Bergson: It is so stipulated, Your Honor.

Mr. Saunders: I offer in evidence Government's Exhibit No. 115.

The Court: It may be admitted.

(Thereupon, Table 26, submitted by the Association was marked Government's Exhibit 115, for identification, and received in evidence.)

By Mr. Saunders:

Q. Mr. Hooper, you testified about the meeting with Mr. Ward at which you say that meeting gave rise to the negotiations for the purchase of Embassy Dairy. As I recall, you testified that Mr. Ward made the first suggestion as to the purchase of Embassy by the Association. Is that correct?

A. Yes, sir, that is correct.

Q. Isn't it a fact, Mr. Hooper, that you, rather than Mr. Ward, made the first overture?

A. No, sir, I stated it was Mr. Ward.

Q. And you are certain of your recollection as to that meeting?

A. I am very certain. Otherwise, I would not have said it.

[fol. 1213] Q. Are you certain of the date of the meeting, Mr. Hooper?

A. Yes, sir.

Q. And the date was what, sir?

A. April 12.

Q. Mr. Hooper, on deposition taken on October 1, 1957, didn't you place the meeting in March?

A. Yes, sir, I did.

The Court: I think you should confront the witness with the deposition. Our practice is that you read the question and answer to him.

By Mr. Saunders:

Q. At page 47 of Mr. Hooper's deposition, the questions and answers:

"Question: Can you fix the date in which you went to Mr. Ward's office, Mr. Hooper?

"Answer: I can't fix the date, sitting here. I can tell you I think it was in March.

"Question: Will you accept that as a calendar of 1954?

"Answer: I will accept it as a calendar but it certainly will not help my recollection. There are a lot of days in March.

"Question: You are placing—

[fol. 1214] "Answer: It was in March and prior to a Board meeting. Now, better than that, I cannot pinpoint it."

The Court: What is your question?

By Mr. Saunders:

Q. Was that not your testimony on the deposition?

A. At the time of the deposition it was, yes, sir, Mr. Saunders. At the time you asked me that question, I gave you, to the best of my recollection, an honest answer. Since that time, I have looked it up. I checked my expense account and found my cab fare that I paid to go to Mr. Ward's office on that date and fixed it exactly as April 12.

Q. You also testified on the day of the deposition that it was in March?

A. I say I answered the question the best I could. You questioned me for 12 days—

The Court: You have answered the question.

By Mr. Saunders:

Q. You testified, Mr. Hooper, that early in 1954 Harvey Dairy changed hands, is that right, sir?

A. Yes, sir.

Q. Isn't it a fact that you, believing or knowing that Sam Harvey, the owner of Harvey Dairy, was negotiating for a possible sale of the dairy, offered Mr. Harvey $25,000 more for that business than any other offer that had been [fol. 1215] made to him theretofore without knowing, in fact, what the previous offer was?

Mr. Bergson: I object, Your Honor. This is evidence which you excluded in the Government's case as being irrelevant to the issues.

The Court: Objection sustained. This would be clearly relevant under the conspiracy count but it is not relevant under the third cause of action we are now trying.

Mr. Saunders: May I be heard on that, Your Honor?

The Court: Yes.

Mr. Saunders: It was excluded—Mr. Bergson is correct—but Mr. Hooper, on direct examination was asked about the cessation of purchasers by Harvey. We want to show the Court that the Association sought to purchase Harvey to retain its business.

The Court: I am going to exclude it because it is not relevant as to the issues that we are now trying because this trial is limited solely to the legality vel non of the acquisition of Embassy Dairy and Richfield Dairy.

By Mr. Saunders:

Q. In answer to a question on direct examination, Mr. Hooper, you indicated you had not discussed with any dealer in the Washington metropolitan area, prior to May, 1956, the fact that the Association was negotiating for the purchase of Embassy Dairy, is that correct?

[fol. 1216] A. Yes, that is correct.

Q. Didn't you, Mr. Hooper, considerably prior to May 26 tell Mr. James Otto Phillips of Wakefield that you were negotiating for the purchase of Embassy Dairy?

A. No, sir, I did not.

Q. What date did you fix, Mr. Hooper, as the date of the first discussion with Mr. Ward with respect to the Embassy producers and shippers?

A. About a week prior to May 26, Mr. Saunders, so that would have been somewhere in the area of—let me put it between possibly May the 14th and the 19th, somewhere in that area. I do not have the exact date. It was when he first tendered us the rough draft of his proposed sales agreement which was about a week prior to the 26th.

Q. I show you now Government's Exhibit No. 22 and direct your attention to the third page thereof and ask you if it does not state that the Association anticipated, as a result of this acquisition, obtaining 60 to 70 new members?

A. Yes, sir.

Q. What was the basis for your statement that you expected to obtain 60 or 70 new members in the statement made on May 5?

A. We assumed that the producers shipping to the Embassy Dairy would continue to stay in the Washington [fol. 1217] market and would ship to various dairies. We felt that about 60 or 70 of those producers would prefer coming to the Association rather than going to other dairies.

Q. That all of the Embassy shippers would stay in the Washington market?

A. There was no reason to suppose otherwise.

Q. How, then, would the acquisition have eased your surplus problem?

A. To the extent that we were able to replace milk coming from outside the area, it would have helped the surplus situation and a fairly substantial amount of milk over and above the producer-members was being purchased by Mr. Ward from sources in bulk outside regular producers, in other words, from Pennsylvania, Ohio, or various places.

Q. You know, as a matter of fact, do you not, Mr. Hooper, that that amounted to only about 15 per cent of Embassy's total requirements?

A. No, I don't know it for a fact, Mr. Saunders. We estimated it would amount to about 8,000 gallons a day.

Q. You testified with respect to Harvey Dairy cessation of purchases in October, 1954, that Harvey Dairy did not purchase District of Columbia licensed milk from the Association, is that correct?

A. It purchased primarily Maryland permit milk. How- [fol. 1218] ever, we supplemented that milk with District of Columbia milk. In other words, they were getting both.

Q. Harvey asked, demanded or required only Maryland licensed milk?

A. Yes, sir. The word would be "required."

Q. Required, yes, sir. Was there a quantity of District of Columbia licensed milk available not committed to some outlet which would have met Harvey Dairy's requirements as of October, 1954?

A. Yes, sir.

Q. Where was it, Mr. Hooper?

A. It was going into surplus channels, mostly in the Fredrick, Maryland, the manufacturing plant of the Chestnut Farms Chevy Chase Dairy.

Q. Whose milk was that?

A. The milk of Maryland-Virginia Milk Producers Association.

Q. Was there a like quantity of District of Columbia licensed milk from any other source than from the Association?

A. I don't think so, no, sir. I might state there, Mr. Saunders, when I say there wasn't other than such milk as would have been available from producers of Embassy Dairy if Harvey wanted to take any of those producers on.

Q. How many such producers belonged to your Associa-
[fol. 1219] tion as of October?

A. Of which producers?

Q. Of the former Embassy producers.

A. As of October, Mr. Saunders, I don't know the exact figure. As of December, I think there were 36.

Q. And most of the 36 signed contracts about August, 1954, did they not?

A. I think during August, yes, sir, most of them.

Q. And you knew that the producers who had gone to Green Spring were under contract to Mr. Ward, did you not?

A. Yes, sir.

Q. Mr. Hooper, while you were on the stand for direct examination, Mr. Bergson offered stipulations concerning the sales of milk or fluid milk by Highs and Harveys and I believe you heard him call the Court's attention to the fact that there were substantial increases in the sales of fluid milk by both those firms?

A. Yes, sir, I heard that.

Q. Do you know whether there were similar increases in sales on the part of any other dealer in the Washington metropolitan area during the period covered by those stipulations?

A. I would say there were increases in other dairies but not as dramatic as the increases by those two dairies.

[fol. 1220] Q. Is it not a fact, therefore, that the only dealers who showed substantial increases in sales were

those not dependent upon the Association for their requirements of milk?

A. No, sir, I would not say that.

Q. Why would you disagree with that as a fair statement?

A. Because I think other dealers in the market have shown increases in their sales.

Q. My question was: Is it not a fact that the only dealers showing such substantial sales, increases in their sales of fluid milk were dealers who were not dependent upon the Association for a supply of milk?

A. Percentage-wise, from the figures I have seen, I would say they showed the greatest percentage increase, yes, sir.

Q. Mr. Hooper, on direct examination you also testified, as I recall, that the Class 1 price had remained the same since the acquisition.

A. I believe I said it had not been increased; not remained the same. It had been reduced several times and brought back to its present level. It has not been increased.

Q. Isn't it a fact that earlier this year the Class 1 price [fol. 1221] reached the highest price ever in this market, a price of $7.02 per hundred weight?

A. Yes, sir. I overlooked that because it was not a regular increase. It was a special emergency drought provision placed in effect by the Virginia Milk Commission to try to tide producers over so they could get feed and was only for a specified period of time.

Q. The Association put that increase in effect in the District of Columbia and in Maryland, where the Virginia Milk Commission has no authority, on its own initiative, did it not?

A. Yes, it did.

Q. That increase was in effect for six months?

A. October 1, 1957 to March 31, 1958, when it was automatically terminated and the price reverted back to the original price.

Q. You stated that the Association has used a Virginia Milk Commission established Class 1 price in sales throughout the Washington metropolitan area?

A. Yes, sir, that is true.

Q. Isn't it a fact, Mr. Hooper, that the Association uses the Virginia Milk Commission price when it wants to use it and disregards it when it does not want to use it?

A. No, sir, I would not say that.

Mr. Saunders: I ask that this document be marked as [fol. 1222] Government's Exhibit, for identification, No. 116.

(Thereupon, Price Notification to customers signed by Mr. Hooper was marked Government's Exhibit No. 116, for identification.)

By Mr. Saunders:

Q. I show you now Government's Exhibit, for identification, No. 116, Mr. Hooper, and ask you if this is not a price notification to your customers signed by you?

A. Yes, sir.

Q. I ask you, Mr. Hooper, whether or not this notification does not indicate that the Association is raising the Class price effective July 1, 1956 and that this price increase is in lieu of the scheduled restoration of the price as set up under the Virginia Milk Commission regulation for September 1, 1956?

A. Yes, sir, that anticipates the price change and it states that it was due to severe drought conditions. It did not raise the price, Mr. Saunders, above the normal price.

Q. The Virginia Milk Commission price as of July 1, 1956 was a lower price than the Association put into effect on that date, was it not?

A. That is correct, sir. The Virginia Milk Commission price is a minimum price.

Q. Will you please answer my question, Mr. Hooper?

[fol. 1223] The Court: He has answered the question.

Mr. Saunders: I move to strike the last response as not responsive.

The Court: No, I will let it stand.

Mr. Saunders: I ask that the Association's Board of Directors minutes of the meeting of April 30, 1954, be marked as Government's Exhibit, for identification, No. 117.

The Court: I suppose that will be stipulated. It is from the Association's files, I presume.

(Thereupon, The Association's Board of Directors minutes of meeting of April 30, 1954, was marked Government's Exhibit No. 117, for identification.)

By Mr. Saunders:

Q. Does not Government's Exhibit No. 117, the Board of Directors minutes of the meeting of April 30, 1954, contain the following resolution—

The Court: Suppose you offer it in evidence and it speaks for itself. That is, if you want to introduce it into the record, the way to do it is to offer it and then it speaks for itself.

Mr. Saunders: I offer it in evidence and direct Your Honor's attention to the paragraph about half way down the page beginning, "Be it hereby resolved."

The Court: Very well, it will be received.

[fol. 1224] (Thereupon, Government's Exhibit No. 117, heretofore marked for identification, was received in evidence.)

The Court: We will take our usual mid-afternoon recess at this time.

(Thereupon, a short recess was taken.)

[fol. 1225] The Court: You may proceed, Mr. Saunders.

By Mr. Saunders:

Q. Mr. Hooper, does your position, or do you have a position or title with reference to the Embassy Division of Defendant?

A. Yes, sir; I do. I am carried as Managing Director and Treasurer of the Embassy Division.

Q. And in that capacity, Mr. Hooper, you have engaged in labor negotiations on behalf of the Embassy Division?

A. No, sir; I, personally, have not.

Q. You have never participated in any meetings involving labor matters?

A. No, sir. Negotiations are carried on by representatives of the Division who are especially assigned to that work.

Q. Have you ever met with other dealers in connection with labor matters?

The Court: What bearing does that have on the issues of this case?

Mr. Saunders: Mr. Hooper testified, your Honor, on direct examination, that there is no relationship between the Embassy Division and the Association as a whole in connection with—

The Court: I think you need not pursue that. I do not [fol. 1226] care whether there is or not. Embassy is owned by the defendant. Whether they operate the various divisions in watertight compartments or as all one, does not make any difference. They control all the divisions.

Mr. Saunders: We think it may be relevant to show that they don't operate them as watertight compartments, either.

The Court: I do not think it is material whether they do or not. You know, the statute refers to tendency—it does not use those words but it refers to tendency to monopoly and tendency to lessen competition. You do not have to prove that competition was actually lessened so long as there is power to lessen it.

Mr. Saunders: Thank you, your Honor.

By Mr. Saunders:

Q. Mr. Hooper, on direct examination you testified with respect to the Association's activity with respect to Government contract prices after the acquisition. Is it not a fact, Mr. Hooper, that between May 26, 1954, the date of the acquisition, and December 31, 1954, the Association did not announce or establish for all of its customers a price lower than the Class I price, the regular price, for Government contract milk in the Washington metropolitan area?

[fol. 1227] A. I don't think that is a fact, Mr. Saunders.

Q. Do you recall, Mr. Hooper, for which installations the Association set contract or lower than Class I prices in that period?

A. No, sir, not right now. I can't remember back that far, and all the details there.

Q. You referred to the fact that the auditing system, concerning which you testified, was commenced under Federal regulation in 1940, I believe you said, is that correct?

A. Yes, sir.

Q. Who made the audits under Federal regulation?

A. Representatives of the Market Administrator.

Q. Of the Department of Agriculture, in other words?

A. Yes, sir.

Q. You heard Mr. Remsberg, the president of your Association, testify the other day, did you not?

A. Yes, sir.

Q. Mr. Remsberg—as I believe you, yourself, did—stressed the surplus problem that the Association allegedly faced early in 1954. Is that correct?

A. Yes, sir. It was a very real thing.

Q. The surplus problem was a real thing?

A. Yes, sir.

Q. Would you describe, Mr. Hooper, the period during [fol. 1228] which this surplus problem was a real thing?

A. Actually the surplus problem became burdensome early in 1953 and then increased from that time on.

The Court: Do you mean by that that the amount of milk going into Class III was on the increase?

The Witness: Yes, sir.

By Mr. Saunders:

Q. Now, Mr. Hooper, isn't it a fact that a firm such as yours, supplying such large quantities of milk as it did in 1954, requires a reserve or surplus in order to meet fluctuating market demand?

A. Yes, sir, there is a necessary reserve, a safety reserve that must be maintained at all times.

Q. Well—

The Court: Do you mean by your previous answer that the amount of surplus milk was increasing beyond the necessary margin or the necessary surplus that should be maintained?

The Witness: Yes, sir; 'way beyond that.

By Mr. Saunders:

Q. Is that the same thing as saying that your surplus was excessive?

A. Yes, sir.

Q. Was it unmanageable?

[fol. 1229] A. I don't know how to use the word "unmanageable." It was uneconomical and in a number of instances milk, or skim milk, went down the sewer because there wasn't any facilities to handle the milk.

The Court: Do you mean that the excessive amount going into Class III, too much of the milk was sold at a low price? Is that what it comes down to?

The Witness: Yes, sir, and even beyond that because there wasn't even facilities in this market to handle all of the Class III.

In other words, we couldn't find buyers for all of the Class III.

By Mr. Saunders:

Q. And you stated, Mr. Hooper, that the reason for the acquisition of Embassy was to help remove this excessive surplus from the market?

A. To help remove some of it, sir.

The Court: I am going to interrupt again, if you do not mind.

Was it to remove the excessive surplus, or was it to move it up from Class III to Class I?

The Witness: It was to move it out of Class III into Class I, sir.

[fol. 1230] By Mr. Saunders:

Q. It was to move milk which you stated was excessive in Class III into Class I?

A. Yes, sir.

Q. Isn't the real reason for the acquisition, Mr. Hooper, the fact that you wanted to eliminate Embassy Dairy from this market as an outlet for independently-produced milk?

A. No, sir.

Q. And that the reason had nothing to do with surplus?

A. No, sir.

Q. I ask you, Mr. Hooper, if this is not the fact, that in 1954 the Association had no excessive surplus, that it had no excessive surplus in April, 1954?

A. That is not a fact, sir.

Q. Mr. Hooper, didn't you make the following statement to the Department of Agriculture—

The Court: Our practice is that you must identify where that statement was made.

Mr. Saunders: Where, your Honor?

The Court: Or identify the document if it is in a document.

By Mr. Saunders:

Q. In a letter to Mr. Herbert Forrest, Director of the Dairy Branch, Production and Marketing Administration, [fol. 1231] United States Department of Agriculture, written by you on April 26, 1956, didn't you make this statement:

"Too, pricing policies in this market for the past five years have not resulted in increased milk production greater than the national average. A review of the production and sales of this market would reveal that the increase has been one fully justified by the growing needs of this Metropolitan area. There has not been any excessive or unmanageable surplus."

A. I don't recall writing it but I don't think that the increase in production in the Washington market was in excess of the national average. We have been burdened nationally with a tremendous surplus. And I also don't think, sir, that the increase in production in the Washington market was out of line with the increase in population here. The problem was there was no outlet for the milk.

Q. I show you the document marked as Plaintiff's Exhibit No. 118 and ask if this is not a letter written by you as described, Mr. Hooper?

A. Yes, sir, it is a letter written by me.

Mr. Saunders: I offer this document in evidence and [fol. 1232] direct the Court's attention to the marked portion on page 3.

The Court: Have you seen this?

Mr. Bergson: I have seen it. No objection.

The Court: It may be admitted.

(A document previously identified Government Exhibit No. 118 is received in evidence.)

By Mr. Saunders:

Q. Mr. Hooper, is it not also the fact that on April 16, 1954, within a few days of the date that you placed as the meeting with Mr. Ward, at which time the negotiation for the purchase of Embassy began, Mr. B. B. Derrick, the Secretary-Treasurer of the Association, publicly stated in your presence, at a meeting of the Virginia Milk Commission in Alexandria, that there was a hysteria about a few gallons of milk? Do you recall that, Mr. Hooper?

A. No, sir; I do not.

The Court: I am going to exclude that. You have a right to confront any witness with the witness' own prior statements that are contradictory to his testimony on the stand. You do not have a right to confront him with someone else's prior statements, even if they were made in his presence.

[fol. 1233] Mr. Saunders: This is a statement by an officer of the defendant, your Honor.

The Court: I repeat, on cross-examination you have a right to confront the witness, for the purpose of testing his credibility, with any prior statement that he, himself, has made that contradicts or is inconsistent with anything he said on the witness stand. You may not confront him with a statement made by someone else, no matter who that someone else may be. Because that does not affect his credibility.

Mr. Saunders: This is being offered, your Honor, not to affect this witness' credibility but as proof of—to get to the truth of the fact whether or not there was a surplus.

The Court: Then that is not the way to do it.

By Mr. Saunders:

Q. Did you attend a meeting of—a hearing of the Virginia Milk Commission, Mr. Hooper, in Alexandria, on or about April 16, 1954?

A. Actually, Mr. Saunders, I honestly do not know whether I did or not.

The Court: If this is being offered as proof of the fact rather than as to credibility, I venture to suggest to counsel that we should not go too far afield on minor tangents.

[fol. 1234] Mr. Saunders: Your Honor, I will pass then the matter of offering it as proof of the fact, and I will go back to the matter of credibility.

The Court: Then as to credibility you may confront him with his own prior statements but not with somebody else's prior statements.

By Mr. Saunders:

Q. Did you not make the following statement, Mr. Hooper, on April 16, 1954 before a hearing of the State Milk Commission in Alexandria, Virginia:

"We have a surplus, sure; we have a surplus right now. We have to have a surplus twelve months in the year to start with. And in the spring you always do get a little more surplus. Mr. Click will show you that surplus is not as great as a lot of people think. In fact, as of today our production is less than it was a year ago today. So, on this surplus problem, we need surplus because of the needs of this market."

Mr. Saunders: I ask that this document be marked as Plaintiff's Exhibit for identification No. 119.

[fol. 1235] (A document is marked for identification Government's Exhibit No. 119.)

By Mr. Saunders:

Q. Do you recall making that statement, Mr. Hooper?

A. Mr. Saunders, I have stated before, I have no recollection of even attending that meeting.

The Court: You know, I think we are getting into minutiae here, Mr. Saunders. He testified that what they wanted to do was to increase their receipts by moving some of the Class III milk into Class I. Now, whether you call it manageable or unmanageable, those things are just a choice of adjectives. That was the real purpose, according to his own testimony, and frankly, is obvious.

Mr. Saunders: The witness has testified to a number of things and your Honor is aware—

The Court: I understand. Cross examination as to credibility is within the discretion of the Court. I think we are getting to a point where the law of diminishing returns is beginning to operate.

Mr. Saunders: May I conclude by admitting this document?

The Court: Yes, you may offer it and I will admit it.

Mr. Bergson: No objection.

[fol. 1236] The Court: It may be admitted.

(Government's Exhibit No. 119 is received in evidence.)

* * * * * * * *

[fol. 1333] Direct examination.

By Mr. Bergson:

Q. Mr. Samuels, will you please state your name and your address?

A. My home address?

Q. Yes.

A. My name is J. Kenneth Samuels. My home address is 2905 McKinley Street, Northwest.

Q. What is your position?

A. I am Director of the Marketing Division in the Department of Cooperative Service, United States Department of Agriculture.

The Court: You are going so fast I did not catch all of your title. Would you mind repeating it?

The Witness: I am Director of the Marketing Division in the Farmer Cooperative Service in the Department of Agriculture.

By Mr. Bergson:

Q. Will you tell us how long you have held this position and give us a brief description of your duties?

A. I have been in this position for five years. In my division, there are varied commodity branches such as the Dairy Branch, Livestock Branch, and so forth, and the work in these various branches comes over my desk and

[fol. 1334] I have general supervision over these commodity studies that we make.

Q. Including dairy cooperatives?

A. Yes, sir.

Q. Can you state whether or not the acquisition of the assets of Embassy Dairy, Inc., by the Maryland-Virginia Milk Producers Association, came before the Farmer Cooperative Service prior to its consummation?

A. Yes, sir.

Q. Will you describe the manner in which it came to the attention of the Farmers Cooperative Service?

A. We received the request from the Baltimore Bank for Cooperatives to make a study as to the economics of buying the Embassy Dairy by the Cooperative, whether it was a good purchase for the farmers.

Q. What action did the Farmers Cooperative Service take on this request?

A. Donald Hirsch, who was in charge of our Dairy Branch at that time, made a study of the purchase and he reviewed the documents, interviewed various persons regarding the purchase of this by the Association.

Q. Was Mr. Hirsch under your general direction and supervision?

A. Yes, sir.

[fol. 1335] Q. Can you summarize the conclusion which the Farmers Cooperative Service reached in 1954 with respect to this acquisition?

A. Well, in making this survey, we considered the favorable factors and the unfavorable factors to the Association's members and we considered, for example, that the unfavorable factor was that the price was a little too high, we thought. We considered the volume of the Embassy Division as it might decline. We did not feel that the contract price would rise to the extent that it was indicated to us that it might.

On the favorable side, we considered that the shift of the Association milk from Class 3 surplus into Class 1 and Class 2 would be the main favorable factor and our conclusion was that, one, the difficulties and the benefits—the difficulties were over-emphasized on the part of the producers' organization and its benefits were over-em-

phasized. What I mean—I am sorry—I mean the difficulties were minimized by the Association but we felt, on the whole, this would be a good deal for the producers to enter into and that, through the long run the producers would increase their returns.

Q. From the time of the acquisition, has the Farmer Cooperative Service had occasion to study the Washington [fol. 1336] milk market to determine the effect on competition, if any, on the acquisition of Embassy Dairy, Inc.?

A. Yes, we have.

Q. When?

A. We were requested right at this time to make an analysis of the purchase and its effects.

Q. Who made that request?

A. It was made by your office. It was made by you.

Q. By counsel for the Association?

A. Yes.

Q. I show you a certified copy of a letter dated October 11, 1954, addressed to the Solicitor of the Department of Agriculture by William J. Hughes, Jr., Attorney for Maryland-Virginia Milk Producers Association, and ask you if that is a copy of the request which you received.

A. No, sir. I do not believe this is the request. This is a letter.

The Court: You are not holding a private conference. Will you please speak up?

The Witness: I am sorry. It was on the basis of this letter—

The Court: No, just a moment. I am going to ask Miss Rawls to read the question.

(Thereupon, the last question was read by the reporter.)

[fol. 1337] The Court: There can be only three possible answers to that question. Yes, no, or I do not know.

The Witness: This is a letter that came to the Solicitor's office requesting certain information.

The Court: Then your answer is, yes, is that correct?

The Witness: Yes.

The Court: Very well.

Mr. Bergson: I offer the letter in evidence as Defendant's Exhibit 64.

Mr. Saunders: May I see the letter, please?

Mr. Bergson: I beg your pardon. I am sure you have a copy of it.

Your Honor, that is in your binder as Defendant's Exhibit 64.

I offer the letter, Your Honor, solely for the purpose that the request was made and not for the contents contained therein, the argument.

The Court: The request was made for what?

Mr. Bergson: (Reading):

"We are writing the present letter with the request that your Department consider whether—"

et cetera.

[fol. 1338] The Court: I have it now.

Mr. Bergson: There may have been confusion when I said, "at this time"; I meant at the approximate time of the acquisition and not today.

The Court: I understand.

Mr. Saunders, have you not seen this before?

Mr. Saunders: Yes, Your Honor.

The Court: I directed, at the beginning of the trial, that both sides should familiarize themselves with the exhibits so we would not have to stop to have counsel read the exhibits.

Any objection?

Mr. Saunders: No objection.

The Court: It may be admitted.

(Certified copy of letter dated October 11, 1954, addressed to the Solicitor of the Department of Agriculture, was marked Defendant's Exhibit 64, for identification, and was received in evidence.)

The Court: May I make this inquiry of you, Mr. Bergson: This letter is dated October 11, 1954. The transaction here involved took place on July 26, 1954.

Mr. Bergson: That is quite right, Your Honor.

The Court: What probative value does a letter subsequent to the transaction have?

[fol. 1339] Mr. Bergson: This letter is being offered in connection with our defense under the last paragraph of Section 7 of the Clayton Act which refers to authorization by the Secretary of Agriculture.

The Court: Do you claim that it was a subsequent approval nunc pro tunc?

Mr. Bergson: I claim that you have to look at this whole series of transactions, Your Honor, that this Farmer Cooperative Service considered this prior to the acquisition of it, gave approval or gave advice recommending the loan to the Baltimore Bank for Cooperatives.

The Court: No; but this is a letter from counsel for the defendant to the Solicitor of the Department of Agriculture written several months after the consummation of the transaction.

Mr. Bergson: I think, in getting approval or authorization, whatever it may be, I do not think the statute requires that it be prior.

Mr. Saunders: Your Honor, may I say this?

The Court: I am going to admit it. I will let you make your record, Mr. Bergson: I have indicated my tentative views on it.

Mr. Saunders: Your Honor, I must state, in view of Mr. Bergson's statement, that this is offered for a different [fol. 1340] purpose than that which he initially stated and I will have to object.

The Court: Objection overruled.

I want to say I do not decide questions of substantive law on objections to evidence. It is both relevant and competent on the issues raised by the defense. Whether those issues are valid or not, is something I will have to determine as a matter of substantive law.

Mr. Saunders: I think, by a short statement on my part, I can remove what I think is a murky atmosphere that has been created in this case.

The Court: I do not think there has been any murky atmosphere in this case.

Mr. Saunders: It would appear that the defendant is showing that the Department of Agriculture and the Department of Justice have been working at cross purposes.

The Court: I do not think I can go into that. I understand your desire to make that statement and you have made it.

Mr. Saunders: I have one further statement I would like to make. This case was filed at the direction of the Attorney General with the knowledge of and after prior consultation with the Department of Agriculture.

The Court: I cannot take judicial notice of that. There [fol. 1341] is no record evidence of that and the evidence would not be admissible, and, therefore, I think it is immaterial.

Mr. Bergson: May it please Your Honor, I think I ought to do a little clarifying.

The Court: No. Let us proceed, gentlemen.

Mr. Bergson: I offer in evidence, out of order, Defendant's Exhibit 67, which is defendant's request for admissions Nos. 131, 132, and 133.

Admission No. 131 states as follows:

"The Attorney General did not, prior to the institution of the instant proceeding, request the Secretary of Agriculture to proceed against the Maryland-Virginia Milk Producers Association."

The Court: I see your point.

Mr. Saunders: I think that is irrelevant to this case.

The Court: I am going to admit it. Let us move along. It is likely it has no probative value but I am going to let the defendant make its record.

(Thereupon, Defendant's request for admissions Nos. 131, 132, and 133, were marked Defendant's Exhibit No. 67, for identification and received in evidence.)

By Mr. Bergson:

Q. Mr. Samuels, I now show you a certified copy of a [fol. 1342] letter dated—

The Court: Do not identify documents. If they are certified, they do not have to be identified.

Mr. Bergson: This is identified by the Secretary of Agriculture.

The Court: You know, half a minute identifying one document and half a minute identifying another amounts up to an hour.

Mr. Bergson: I offer as Defendant's Exhibit 65, Certified Copy of a letter dated December 20, 1954, addressed to the Attorney General by R. L. Farrington, Solicitor of the Department of Agriculture and a copy of a covering letter transmitting a copy of that letter to Mr. William J. Hughes.

The Court: I am going to admit it but my admission of the letter is not to be taken as an indication that I think it has probative value. I am going to admit it in order to enable the defendant to make a record on which it desires to predicate its defense.

Mr. Saunders: I object.

The Court: Your objection is noted.

(Thereupon, copy of certified letter dated Dec. 20, 1954, addressed to Attorney General, was marked Defendant's Exhibit 65, for identification, and received in evidence.)

[fol. 1343] Mr. Bergson: I am sorry to take so much of your time, Your Honor, but I would like to offer Defendant's Exhibit 66, Memorandum 1332, which is a delegation by the Secretary of Agriculture to the Solicitor of the Department of Agriculture of the Secretary's responsibilities under the Capper-Volstead Act.

The Court: It may be admitted.

(Thereupon, Memorandum 1332, delegation by Secretary of Agriculture to Solicitor of the Department of Agriculture was marked Defendant's Exhibit 66, for identification, and was received in evidence.)

By Mr. Bergson:

Q. Mr. Samuels, did the Farmer Cooperative Service recently make a study to determine whether the Embassy acquisition by the Association has had the effect of lessening competition in this market, the Washington metropolitan area market?

A. Yes, sir.

Q. What factors did you take into consideration in making this analysis?

A. Well, I made this analysis and I considered the prices in the market, particularly prices to consumers and the sales price of the Class 1 milk. I considered the volume of milk available in the market and I considered the number [fol. 1344] of distributing firms that were operating in the market since 1953—well, in fact, all of them since 1953.

Q. What conclusion did you reach with respect to prices?

A. In Washington, according to a report made by the Department of Agriculture for the year 1953, the prices of quarts of milk delivered to housewives was 24 cents. That was the average for 1953 and the average in 1954 was 24 cents and it rose to 24½ cents in 1955; 25½ cents in 1956, and it was 26 cents in 1957. This was an increase of approximately 8 per cent over that period of time. That increase was approximately the same as the increase in 25 major markets in the United States, that the price of milk rose in the same proportion—

Mr. Whitaker: Your Honor, I object to this.

The Court: Just a moment. You have to wait until the answer is finished and then I will hear your objection; you may proceed.

The Witness: I compared the retail price in Washington with nearby markets, such as Philadelphia and Baltimore and found the same movement over that period of time. I had to take prices that were available to me and I had prices that were in the record for a Federal order here and in that, I had the Class 1 price that Maryland-Virginia [fol. 1345] received for its milk and this price—

The Court: You are getting away from the question.

The Witness: These are the price movements that I considered.

The Court: I thought the question was asked as to your conclusions.

Mr. Bergson: That is right.

The Court: What was your conclusion?

The Witness: My conclusion was that the prices in the market, as far as retail prices were concerned, were practically the same as other markets in this area and in the vicinity.

The Court: What was your objection?

Mr. Whitaker: I request that the answer be stricken on the ground that it is based on hearsay.

The Court: Objection overruled. This is expert testimony. An expert has a right to consult publications, just like a doctor may read a medical text book to help him form his opinion.

By Mr. Bergson:

Q. What conclusion did you reach with respect to the volume of milk available to the Washington metropolitan area?

A. I need to go back to some of the material that was [fol. 1346] admitted in this trial and there it shows, I believe, that the percentage that the Association has of Class 1 milk is approximately the same in 1953 as it was in 1957 and I have again had figures on their totals—.

The Court: No, the question calls for your conclusion on the subject.

By Mr. Bergson:

Q. Let me ask you this: Has volume increased?

A. Yes, sir.

Q. Did you find any indication of any control by the Association over the production of milk in the market for use in the Washington metropolitan area?

A. The Association has no control over the production of milk coming into this market. The production of milk is controlled by the farmers.

Q. What conclusion did you reach with regard to the number of distributors in the markets?

The Court: That is a matter of statistics, is it not?

Mr. Bergson: I think it is.

The Court: That both sides put in evidence.

By Mr. Bergson:

Q. In making your study, did you take into consideration the effect that the acquisition of Embassy Dairy would [fol. 1347] have on producers who are members of the Association?

A. Yes, sir.

Q. What did you find?

A. Well, I conclude from this that by acquiring this outlet, it would enable the producers to move a greater proportion of their milk to sell through the Association direct to the consumers and the other members joining with the Association, they would have to share in its disposition of the surplus of the milk.

Q. On the basis of your study, did you find that there has been a substantial lessening of competition or tendency to monopoly in this market?

Mr. Whitaker: Objection.

The Court: Objection sustained. That is not a matter for expert testimony.

By Mr. Bergson:

Q. How did the acquisition of the assets of Embassy Dairy by the Association accord with the policy or the attitude of the Farmer Cooperatives toward the acquisition of retail outlets by producer associations, the Farmer Cooperative Service?

A. This purchase was in line with some of the things that we have been studying with regard to other cooperatives. We have been advising cooperatives and making [fol. 1348] studies of cooperatives on the feasibility and problems and methods of going into large marketing activities in milk, for instance, in the retail distribution and we feel that this movement on the part of producers here is similar to what is being undertaken by producers in many areas of the country.

Q. Do you consider that this is for the benefit of the consumers?

A. I think it would be a long-run benefit to the consumers and the producers.

Mr. Bergson: No further questions.

The Court: Do you have any cross examination?

Mr. Whitaker: Yes, Your Honor.

The Court: We will have to ask the witness to come back tomorrow.

We will now recess this trial until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:00 o'clock p.m., the trial was recessed to reconvene at 10:00 o'clock a.m., Thursday, November 20, 1958.)

[fol. 1352] PROCEEDINGS

Deputy Clerk: United States vs. Maryland and Virginia Milk Producers.

The Court: You may proceed. I think Mr. Samuels was on the witness stand when we recessed.

Thereupon J. KENNETH SAMUELS, a witness having been previously sworn, resumed his testimony further as follows:

Cross examination.

By Mr. Whitaker:

Q. Mr. Samuels, you stated yesterday that a memorandum was prepared by Mr. Hirsch in May or June of 1954 which set forth the favorable and unfavorable aspects of the Embassy acquisition, the acquisition of Embassy Dairy by defendant.

I believe the date of that memorandum which is now in the record of this case, is June 8, 1954; is that correct?

A. I believe that is correct.

Q. You also stated that you were requested by counsel for defense recently to make a study of the effects of this acquisition, is that correct?

A. That is right.

Q. Did the Defendant Association at any time prior to [fol. 1353] this recent request made by defense counsel request the Farmer Cooperative Service to analyze and advise the defendant with respect to the defendant's purchase of Embassy Dairy?

A. No, sir, we were never asked directly by the Association to make such a—

Q. Is the Hirsch memorandum the only written document reflecting the study and conclusions made by the Farmer Cooperative Service with respect to this acquisition?

A. That is the only document that went out of the Department of Agriculture from our service; yes, sir.

The Court: I think I missed a question and answer two questions and answers back. Would you read them to me?

(The reporter read the question and answer referred to as follows:

"Q. Did the Defendant Association at any time prior to this recent request made by defense counsel request the Farmer Cooperative Service to analyze and advise the defendant with respect to the defendant's purchase of Embassy Dairy?

"A. No, sir, we were never asked directly by the Association to make such a—"

By Mr. Whitaker:

Q. Would you say that the Hirsch study which was made [fol. 1354] in reply to a request by the Baltimore Bank for Cooperatives was directed at and was limited to the question of whether the acquisition of Embassy by the Association was a sound business venture for the cooperative?

A. That was mainly what we were asked to do and did.

Q. You stated that Mr. Hirsch made a study of the purchase, reviewed the documents, and interviewed various persons regarding the purchase of Embassy Dairy. Who were the persons interviewed by Mr. Hirsch and what was the nature of the documents?

The Court: Well, I think it goes a little far afield as to whom Mr. Hirsch interviewed. You have brought out the fact that this was done at the request of the Bank and not at the request of the defendant.

By Mr. Whitaker:

Q. In providing advice and making studies of the problems of individual cooperatives, does the Farmer Coopera-

tive Service attempt to advise cooperatives as to the legality of any past or proposed action?

A. Only when we would be asked to do so.

The Court: What was your answer?

The Witness: When we would be asked to do so, we might suggest—

[fol. 1355] The Court: Well, you would not undertake to give legal advice, would you?

The Witness: No, sir.

By Mr. Whitaker:

Q. With respect to the request you received from the Baltimore Bank, were you so—

The Court: Just a moment. I am not sure that, in the light of the answer that this witness gave to the Court, he understood fully the preceding question. Suppose you read the preceding question to the witness.

(The reporter read the question referred to as follows:

"Q. In providing advice and making studies of the problems of individual cooperatives, does the Farmer Cooperative Service attempt to advise cooperatives as to the legality of any past or proposed action?")

The Court: What was your answer to that?

The Witness: I said only when we may be asked to do so.

The Court: When you are asked to do so, you give legal advice?

The Witness: No, sir; we do not.

[fol. 1356] The Court: The question is: Do you give advice as to the legality?

The Witness: May I explain, sir?

The Court: Yes, indeed.

The Witness: If we would get a letter from a cooperative asking us for legal advice of any sort, we would reply to him that we do not give legal advice direct and we would suggest that he seek an attorney for such advice. I mean, we would make a reply but we would not give him the legal advice.

The Court: Then, do you wish to modify the answer you have given?

The Witness: Yes.

The Court: How do you wish to answer that question?

The Witness: Well, I would say that we do not give legal advice.

The Court: Do you give any advice as to legality, even when you are asked, of a proposed transaction?

The Witness: No, sir.

By Mr. Whitaker:

Q. Therefore, Mr. Samuels, in summarizing the views of the Farmer Cooperative in the memorandum prepared by [fol. 1357] Mr. Hirsch dated June 8, 1954, you did not purport to pass upon the possible implications which the acquisition of Embassy Dairy by the defendant might have under the Antitrust laws?

A. That is right.

Q. Now, Mr. Samuels, referring to the study, the recent study of the effects of the acquisition which you stated yesterday was made at the request—

The Court: Do not make your questions so long; shorten them. Try not to put too much in your question.

By Mr. Whitaker:

Q. Mr. Samuels, yesterday you expressed opinions and conclusions as a result of the study which you recently made?

A. Yes, sir.

Q. Are those opinions and conclusions the opinions and conclusions of the Department of Agriculture or are they the opinions and conclusions of your own personal views?

A. Well, they are my conclusions which I obtained in working with the people in the dairy branch under my direction.

The Court: In your official capacity or in your individual capacity?

[fol. 1358] The Witness: I speak in my capacity as an economist.

The Court: As an economist or as chief of your bureau?

The Witness: Well, I think it was speaking in both ways, as Chief of my Bureau and—

The Court: In other words, you are speaking as a government official?

The Witness: But I was not speaking for the whole Department of Agriculture.

The Court: I understand, but as far as you were speaking, you were speaking as a government official, were you?

The Witness: Yes, sir.

By Mr. Whitaker:

Q. Mr. Samuels, so that we may leave no doubt, are you appearing as a witness in this case as a representative of the Department of Agriculture—

The Court: No, he is appearing as J. Kenneth Samuels in answer to a subpoena. That is the duty of every witness. Nobody appears as a witness in an official capacity. Everybody who appears as a witness, appears as an individual.

Mr. Whitaker: Your Honor, the question was directed to [fol. 1359] determining whether the view he expressed—

The Court: That is not what you said. That is not what the question was.

By Mr. Whitaker:

Q. Mr. Samuels, with respect to the statement you made yesterday to this effect—and I am reading from page 674 of the record, that "We feel that this movement on the part of producers here is similar to what is being undertaken by producers in many areas of the country."

Mr. Samuels, when you say "we feel" did you mean that the Department of Agriculture feels that that is their policy, their views, their conclusions, or did you mean "I feel"—

The Court: Just a moment. There is nothing about policy or conclusions here. There is only a statement of fact. I think you attach too much importance to this answer: "We feel that this movement on the part of producers here is similar to what is being undertaken by producers in many areas of the country."

Suppose you confine yourself in the light of what the answer is.

Mr. Whitaker: Your Honor, in light of the question to which the answer was directed, I thought it was proper.

[fol. 1360] The Court: Never be guided by the question; always be guided by what the witness says.

Mr. Whitaker: I just wanted to clear the record so there would be no—

The Court: Now, just a moment. Don't enter into colloquy with the Court. The Court ruled.

Now, suppose you reframe your question.

By Mr. Whitaker:

Q. Mr. Samuels, I believe you stated yesterday that after the recent study which you have made of the effects of this acquisition, you concluded—made several conclusions, one with respect to the level of prices, one with respect to the volume of production, one with respect to the number of distributors. I should like to turn first to your conclusion with respect—

The Court: No, just ask one simple question. Just ask him a question and start with the question without any prefatory remarks.

By Mr. Whitaker:

Q. Mr. Samuels, what was the source or basis for your conclusions with respect to the retail price levels in this market?

A. The source of the data?

Q. Yes, sir.

[fol. 1361] A. It was an official publication of the Department of Agriculture. I believe it is the fluid milk and cream report, the February, 1958 issue, published by the Agricultural Marketing Service.

Q. Did you or any person under your supervision make any independent or other analysis of the level of retail prices in various markets?

A. No, sir.

Q. Then your conclusion was based solely upon the single

table in the Department of Agriculture's fluid milk and cream report?

A. Yes, sir. It was based on that table.

The Court: I might say to counsel for both sides that I consider it immaterial whether the prices here were higher or lower than prices elsewhere.

I do not recall whether there was an objection or not, but since this was a non-jury case, I thought I would let it in but I do not consider that of any importance.

By Mr. Whitaker:

Q. Mr. Samuels, I believe you also made a conclusion with respect to Class I prices of the defendant?

A. Yes.

Q. What was your conclusion with respect to the Class I prices of the defendant Association?

[fol. 1362] A. My conclusion was that for the period—

The Court: Speak a little louder.

The Witness: My conclusion was that for the period of 1953 through 1956, that the Class I price had remained fairly constant, a few cents down but fairly constant.

By Mr. Whitaker:

Q. And what was the source of your information? A. The source of my information was testify (sic) that was introduced into the hearing regarding a federal order for this market, Federal Milk Order.

Q. And by whom was that information introduced?

A. That was introduced by the Association.

The Court: What was your answer?

The Witness: By the Association.

By Mr. Whitaker:

Q. Did you or any person under your supervision make an independent study or analysis of data as to Class I prices in this market?

A. No, sir, we accepted the records of that hearing.

Q. You relied solely upon the information submitted by

the defendant in support of its application for a Federal Marketing Order.

A. As far as the defendant's prices, yes, sir.

[fol. 1363] Q. I show you a table, table No. 2 and ask you, Mr. Samuels, whether this is the table which was submitted in the Federal Marketing Order hearings to which you have referred and on which you relied?

A. No, sir, not that table.

Q. Is Table 21 the table to which you have referred?

A. Yes, sir, that is the table.

Q. This table has figures as to Class I prices only up to and including 1956, is that correct?

A. Yes, sir, that is correct.

Q. Mr. Samuels, you did not make a study of any Class I prices subsequent to 1956?

A. No, sir.

Q. I should now like to show to you, Mr. Samuels, a fluid milk and cream report of February, 1958, and ask you —direct your attention to page 6 and ask you to state the price—dealer's buying price for milk as of February, 1956 in Washington, D.C.?

A. Sir, I believe this is not the price for 1956.

Q. The table states it is the price for February, 1958?

A. Yes, sir.

Q. That is the price to which my question was directed.

[fol. 1364] The Court: You said 1956, I am afraid, Mr. Whitaker.

Mr. Whitaker: I beg your pardon. I meant to say February, 1958.

The Witness: Well, the dealer's price as quoted in this report—

The Court: Don't ask the witness what the document states. If you want to use the document, you may offer it in evidence, Mr. Whitaker.

By Mr. Whitaker:

Q. Does the table not show that the price of Class I milk in Washington, D.C. as of February, 1958 was $7.02?

A. No, sir, it does not refer to Class I.

The Court: What was your answer? You are not having a private conference with counsel. Let us all hear it.

The Witness: He asked me——

The Court: Repeat what you said.

The Witness: I said, no, sir, it did not say that that was the Class I price.

The Court: You let your voice go down towards the end of your sentence. Would you repeat what you said?

The Witness: The table does not say that that was the [fol. 1365] Class I price.

The Court: I see.

By Mr. Whitaker:

Q. Does the table say that that is the dealer's buying price for milk?

The Court: Well, now, the table speaks for itself, as does any other document. If you want to offer that in evidence, you may do so but do not examine the witness concerning the contents of a document that is not in evidence.

Mr. Whitaker: Your Honor, I would like to ask the—

The Court: Suppose you come to this side. Now, what is it you want to do, Mr. Whitaker?

Mr. Whitaker: I would like to show the table to the witness so that he may comment upon—what the table indicates or—

The Court: It is not necessary to ask a witness to comment. You have a right to ask him—in the first place, he said he made no study of the prices after 1956.

Now, if you want to put in evidence what the prices were in 1958, I would suggest that you just put the document in evidence.

Is it your point that the prices went up after 1956?

[fol. 1366] Mr. Whitaker: Yes, your Honor.

The Court: Well, just put the document in evidence that shows that.

Mr. Whitaker: May I direct one question to the witness?

The Court: Yes.

By Mr. Whitaker:

Q. Mr. Samuels, do you know what the price of dealers' milk in February, 1958 was?

A. Yes, sir.

Q. What was that price?

A. Well, according to that report it was $7.02.

Q. Mr. Samuels, do you know whether the defendant's Class I price has ever been as high as $7.02?

A. Do I know?

Q. Yes.

A. No, sir, I do not know.

Q. Mr. Samuels, in your study of the prices of the defendant Association, did you take into consideration the price which the Defendant Association sets for milk which is resold to Government installations?

A. I do not have any data on that.

Q. Mr. Samuels, you testified that the volume of milk in this market has increased and that the defendant has no [fol. 1367] control over the production of milk coming into this market. On what do you base that conclusion, on what type of information or data?

The Court: What conclusion?

Mr. Whitaker: That the volume of production has increased and—

The Court: There are two different conclusions. Which one are you asking him about?

Mr. Whitaker: That the volume of production of the defendant has increased.

The Witness: I base it on data generally that was in the Federal Order hearing regarding the production of milk of the Association.

By Mr. Whitaker:

Q. You did not, nor any person under your supervision, make an independent analysis or study of such data with respect to volume of production in this market?

A. We made an independent study of the data that were available to us from that order.

The Court: What was your answer?

The Witness: I say we made an independent study of the data that were available to us from the hearing.

By Mr. Whitaker:

Q. But your conclusion is based solely upon information [fol. 1368] supplied at the hearing by the defendant Association in support of its application for Federal Marketing Order?

A. No, sir.

Mr. Bergson: I object to that. In view of the answer, I withdraw the objection.

By Mr. Whitaker:

Q. Then what other data did you rely on?

A. I used the data that has been introduced into this trial.

The Court: You did what? Suppose you use the microphone.

The Witness: I have used data that has been introduced into this trial regarding the percentage of milk that the Association has of the total market.

By Mr. Whitaker:

Q. I believe you are referring to defendant's Exhibit 52-A which was introduced yesterday which is the table that they submitted at the Federal Market—

The Court: Do not make statements; just ask questions.

By Mr. Whitaker:

Q. Is that the table to which you are referring?

A. I do not know the number of the table, sir.

[fol. 1369] Q. I show you this table No. 1, Mr. Samuels, which was defendant's exhibit 52-A, and ask you if that is the information upon which you relied in making your study?

A. That is part of the information.

Q. And what other information did you rely upon?

A. The other information is the data that were introduced regarding the percentage of Class I milk that—the fluid milk that the Association handles in this market, which I believe was around 86 per cent or some figure such as that.

Q. This table, Mr. Samuels, Defendant's Exhibit 52-A, reflects only the volume of production of the defendant Association, is that correct?

A. Well, it shows the volume of production and also shows the percentage of that production that went into Class I, Class II and Class III.

Q. Does the table indicate that the proportion of Class I sales has remained at about 71.4 per cent from the period 1953 through 1957?

A. Well, no, sir. It has varied within that period. In 1956 it was 71.9 per cent; in 1957 it was 71.6 per cent as compared to 71.4 per cent. In 1954 and 1955 the percentage went up somewhat.

Q. Do you know the approximate percentage increase [fol. 1370] in the volume of production of defendant during the period 1953 to 1957?

A. Yes, sir.

Q. What is the approximate increase?

A. It is approximately 23 per cent. The Class I was 23 per cent and since the percentage—well, it was approximately 23 per cent.

Q. So the defendant's proportion of Class I sales has kept pace with its increased volume of production, is that not correct?

A. Yes, sir.

Q. Mr. Samuels, you also stated that the defendant Association can not control production. Is it not true that the members of the defendant Association could put into operation some sort of base surplus plan or other similar plan which would tend to restrict the volume of production?

A. I cannot answer that, sir.

Q. When you said that the defendant Association could not control production, you did not mean that they had absolutely no control whatsoever, that they could not if they so desired put into plan some sort of base surplus plan which would tend to decrease its volume of production?

The Court: I might say that the Court understood that answer to be that the Association could not control the [fol. 1371] amount of milk that the farms produced because, after all, the defendant is only a marketing agent for the milk obtained by the farmers from the cow.

By Mr. Whitaker:

Q. The farmers who are members of the Association, as members of the Association, could put into effect such a plan, could they not, Mr. Samuels?

The Court: What kind of a plan?

Mr. Whitaker: A base surplus plan or other plan, your Honor, which would tend to control the volume of production.

The Court: I am afraid you are getting into technical phraseology with which the Court is not familiar. What is a base surplus plan? Suppose you translate your questions into non-technical terminology.

Mr. Whitaker: Perhaps Mr. Samuels—

The Court: You do it. You are conducting the interrogation.

Mr. Whitaker: Your Honor, it is an—

The Court: No, do not tell me. Just reframe your question in such a way that it will be understood by a person who is not an economist and is not engaged in the milk industry.

[fol. 1372] By Mr. Whitaker:

Q. Mr. Samuels, did you mean to say then that the farmers who are members of the Defendant Association could not, even if they so desired, limit their production in volume of milk?

A. Well, I would not say that. A farmer has—he can do what he wants to with his farm.

The Court: He could sell some of the cows that he has?

The Witness: He could if he wants to, certainly. The farmer is free to determine his own production on his farm.

By Mr. Whitaker:

Q. Mr. Samuels, is not an increasing volume of production in recent years necessary to meet the increased demand of a growing population in this Washington metropolitan area?

A. Yes, sir.

Q. Mr. Samuels, you also stated that the acquisition of Embassy Dairy by the Defendant Association was in line with what other cooperatives had been doing in other markets in this country. What other markets did you compare and did you study—

The Court: I am going to exclude that. I want to say [fol. 1373] this: That I am not going to be affected by what was done in other markets. I am only going to determine whether this was a violation of the law. If it is a violation of law, the mere fact that similar transactions might have been consummated in other markets would not affect the issues of this case. And if this is not a violation of law, then certainly it makes no difference what anybody else was doing.

Mr. Whitaker: Your Honor, that is the Government's position.

The Court: Very well. Then you need not pursue this particular aspect.

Mr. Whitaker: I have one remaining question.

The Court: I am not trying to cut you off but I am just saying you need not explore this particular phase.

Mr. Whitaker: I would like to direct only one more question with respect to this phase, your Honor.

The Court: Very well.

By Mr. Whitaker:

Q. In the memorandum prepared by Mr. Hirsch dated June 8, 1954, was any reference made to the fact that in his opinion this acquisition was in line or similar to acquisitions made by other cooperatives?

[fol. 1374] The Court: In the light of the remarks I just made I am going to exclude that.

By Mr. Whitaker:

Q. Mr. Samuels, at the time the Hirsch memorandum was prepared on June 8, 1954, did the Farmer Cooperative Service know that the defendant Association had already, that is, on May 26, 1954, signed a contract for the purchase of the assets of Embassy Dairy?

A. Are you asking for the Farmer Cooperative Service or for myself, if I knew?

Q. If the Farmer Cooperative Service knew.

A. I cannot say. I do not know, sir. Did not know, myself.

Mr. Whitaker: Thank you. That is all.

Redirect examination.

By Mr. Bergson:

Q. Mr. Samuels, I show you a series of tables which I will not take the time to identify, but ask you whether or not you had these tables available before you when you were making the study that we requested you to make in 1958?

A. Yes, sir.

Mr. Bergson: Your Honor, I will identify these tables as the tables that are attached to Stipulation No. 11, which [fol. 1375] was agreed upon between the Government and ourselves as to the market factor—the pertinent figures relating to this market for the periods 1953 to 1957.

Mr. Saunders: I am sure Mr. Bergson did not mean to say that there was a stipulation that all pertinent figures—

The Court: Let us move along, gentlemen.

By Mr. Bergson:

Q. Mr. Samuels, was the Department of Agriculture asked to examine this acquisition in 1954?

The Court: Is that proper redirect examination?

Mr. Bergson: The question on cross, your Honor, was "Was the Farmer Cooperative Service asked to make such an examination?" Now I think—

The Court: The Farmer Cooperative Service, I take it, is a branch of the Department of Agriculture.

Mr. Bergson: I think Mr. Samuels' answer was limited to the Farmer Cooperative Service alone and I am sure that he knows that the—

The Court: Very well. You may answer.

By Mr. Bergson:

Q. Was the Department of Agriculture asked to make an examination of this acquisition in 1954, to your knowledge? [fol. 1376] A. Well, there was a letter from Colonel Hughes to the Solicitor of the Department of Agriculture.

Q. Requesting such an examination be made.

Mr. Samuels, do you know that for the period October through March—October, 1957 through March, 1958 there were extreme drought conditions in the Washington metropolitan area?

Mr. Saunders: Objection, your Honor. I think Mr. Bergson—

The Court: I think this is proper redirect examination.

Mr. Saunders: Not to the subject matter, your Honor, but to the form of the question.

The Court: Why?

Mr. Saunders: I think he can answer whether he knows whether or not something is a fact.

The Court: I am not going to be too captious. You may answer.

The Witness: I recall there was a dry period, yes, sir.

By Mr. Bergson:

Q. Do you know whether or not the Virginia Milk Commission issued an emergency price formula setting the Class I price at $7.02 for this drought period and that this [fol. 1377] price automatically terminated at the cessation of the drought?

A. Well, I do not have knowledge of that. I do not recall of this coming to my attention.

Q. Now, during this period do you know what happened to the retail price to the consumer?

A. Would you give the period again?

Q. October, 1957 through March, 1958?
A. No, sir; I do not know directly.

The Court: I do not think we should go into that.
Mr. Bergson: I am finished anyway, your Honor.
The Court: Very well.
Anything further with this witness?
Mr. Whitaker: No, sir.
The Court: You may step down.

(Witness excused.)

[fol. 1392] Thereupon MAURICE DAVISON, a witness called in rebuttal by counsel for the Government having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Saunders:

Q. Would you please state your full name.
A. My name is Maurice V. Davison.
Q. Your address is what?
A. 7206—45th Street, Chevy Chase, Maryland.

The Court: How do you spell your first name?
The Witness: M-a-u-r-i-c-e D-a-v-i-s-o-n.

By Mr. Saunders:

Q. Referring to the period January 1, 1954 until May, 1958, Mr. Davison, you were a vice president of Chestnut Farms Dairy during that period?
A. Yes, sir.
Q. And in that capacity you had the responsibility for obtaining the required supply of milk for that dairy?
A. Yes, sir.
Q. During the period that I have mentioned, January 1, 1954 to May, 1958, did Chestnut Farms Dairy obtain as a [fol. 1393] matter of policy, milk from independent producers?
A. No, sir.

Q. From whom did you purchase your supply of milk for resale as fluid milk?

The Court: I thought that was all shown by your tables in the case in chief.

Mr. Saunders: The latter point I suppose is, your Honor.

The Court: Yes. So let us not repeat it.

The Witness: Do you wish me to answer that question?

The Court: No.

Mr. Saunders: No further questions.

Mr. Bergson: I would just like to ask one question.

Cross examination.

By Mr. Bergson:

Q. You stated as a matter of policy you did not purchase from independent producers of milk; whose policy was that?

A. I assume, sir, that it was probably mostly my own, but it was approved by the management of the dairy. I might qualify or explain our reasons for buying—

The Court: No, just a moment. You were not asked for that. Confine yourself to questions, if you do not mind.

[fol. 1394] The Witness: Yes, sir.

By Mr. Bergson:

Q. The policy was determined by Chestnut Farms Dairy?

A. Yes, sir.

Mr. Bergson: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Saunders: At this time I call Mr. Torreyson to the stand.

Thereupon RALPH L. TORREYSON was called as a witness in rebuttal by counsel for the Government and having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Saunders:

Q. Please state your full name.
A. My name is Ralph L. Torreyson.

The Court: How do you spell your last name?
The Witness: T-o-r-r-e-y-s-o-n.

By Mr. Saunders:

Q. What is your address, Mr. Torreyson?
[fol. 1395] A. 5074 Sedgwick Street, Washington, D.C.
Q. You are an officer of Harvey Dairy, Inc.?
A. I am.

The Court: What concern?
Mr. Saunders: Harvey Dairy, Inc.

By Mr. Saunders:

Q. What is your position with that firm, sir?
A. My present position is treasurer of the company.
Q. How long have you held that position?
A. Nearly five years.

The Court: What is your position?
The Witness: My position is treasurer of the company.

By Mr. Saunders:

Q. Would you state the date when you became treasurer?
A. April 1, 1954.
Q. Harvey Dairy is located in Brentwood, just across the District line, in Maryland?
A. Yes.
Q. Directing your attention now, Mr. Torreyson, to the period April to August, 1954, will you please state from whom Harvey Dairy purchased its requirements of milk for resale as fluid milk?

A. From the Maryland and Virginia Milk Producers [fol. 1396] Association.

Q. Did Harvey purchase such milk from other sources during that period?

A. No.

Q. Commencing October 1, 1954 did Harvey Dairy discontinue purchasing milk from the Maryland and Virginia Milk Producers Association?

A. Yes.

Q. Did Harvey Dairy give the Association notice that it would do so prior to October 1, 1954?

A. Yes, we gave them thirty days' notice.

Q. Why did Harvey Dairy cease purchasing its full requirements from the Association?

A. Well, I think one of the contributing factors was the fact that they had bought out a distributor here—

The Court: They did what?

The Witness: They bought out a distributor here, going in business in competition with us, that was a contributing factor.

The Court: I think that is outside of the issues.

Mr. Saunders: Your Honor, this witness is called to testify as to several matters raised—

The Court: I am only referring to this one matter. [fol. 1397] I think this matter is outside of the issues. I doubt whether it is proper rebuttal anyway. But in any event, it is outside of the issues. The mere fact that one of the defendant's prior customers did not like to continue dealing with it because the defendant, itself, became a distributor has no bearing upon the issues in this case.

By Mr. Saunders:

Q. Did the fact that the Association obtained, while you were a customer of the Association, obtained access to your files in connection with monthly audits have anything to do with your decision?

A. Yes, it had a great deal—

The Court: Just a moment.

Mr. Bergson: I object, your Honor, for the same reason.

The Court: I am going to sustain the objection to that as not proper rebuttal. You showed the fact in your case in chief that one of the things that the defendant was able to do was to examine from time to time the records of the various dairies to whom it sold. You have established that fact.

By Mr. Saunders:

Q. Was it the policy, Mr. Torreyson, of Harvey Dairy during the period while you were treasurer—you have been [fol. 1398] treasurer—to purchase milk from individual producers?

A. It has not.

Q. Has this policy—strike that. Directing your attention now to the period at or about October, 1954, when, as you stated you ceased purchasing from the Association, what action if any did the Association take with respect to your notification that you would no longer purchase from it?

A. Well, they made great effort to get us to continue to buy milk from them.

Q. Did the Association do anything in particular that you could describe? You say effort. It is a fairly general answer, Mr. Torreyson.

A. Well, they informed us that, if the company did not continue to buy milk from them, that they would bring all pressure they could to bear.

The Court: They would do what?

The Witness: They would bring whatever pressure they could to bear upon us to keep us buying milk from them.

The Court: I am going to inquire, Mr. Saunders, how is that proper rebuttal? This is part of your case in chief. What is this in rebuttal of?

[fol. 1399] Mr. Saunders: This is in rebuttal, your Honor, of what I believe the defendant tried to show, that dealers in this market are free to cease dealing with the Association and turn to other sources. Now I believe the defendant attempted to show that. They went into the matter of whether full supply contracts—

The Court: I do not recall that there was any evidence or any contention to this effect. The contention was that the producers were free to turn to other purchasers. I do not think there was any contention on the part or any evidence introduced to the effect that dairies who had purchased from the defendant were not free to cease to do business with the defendant and go to someone else.

I want to be sure, however, that I understand this correctly. Do I understand your contention correctly?

Mr. Bergson: You are quite right, your Honor, and I think the fact that they ceased doing business with us was indicative of that.

The Court: I want to be sure of what your contention is.

By Mr. Saunders:

Q. Did the Association indicate to you what type of [fol. 1400] pressure it would bring to bear?

The Court: I am going to exclude that because it is not proper rebuttal.

Mr. Saunders: Your Honor—

The Court: You see, you are reopening the case. That is what you are in effect doing.

Mr. Saunders: May I make an offer of proof, your Honor?

The Court: Yes. You may always do that.

Mr. Saunders: This witness, if permitted to testify along the line of this question and the subsequent questions which relate to the aspect of his testimony, would testify as follows:

The Court: I suggest counsel come to the Bench.

(The following proceedings were had at the bench, the witness having stepped from the witness stand.)

The Court: The reason I am requesting counsel to come to the Bench is so that the witness will not hear the offer of proof because, if I should change my ruling, I do not want the witness to know what the offer of proof is.

Mr. Saunders: The witness would testify, your Honor, that when Harvey Dairy indicated that it was going to

[fol. 1401] continue, or it would go through with its decision to buy milk from other sources, that the defendant's officers stated to Mr. Torreyson that they would flood the territory in which Harvey did business with advertising, that they would use the Embassy Division to take business away from Harvey Dairy, and they would do whatever they could to interfere with Harvey's business.

The Court: I am going to adhere to my ruling because I think this is outside—this is not proper rebuttal.

Mr. Saunders: May I complete the offer, your Honor?

The Court: I beg your pardon.

Mr. Saunders: That when an editorial appeared in a Washington newspaper uncomplimentary to the Association, with which Harvey had nothing to do, that Mr. Torreyson was contacted by James E. Click—

The Court: Just a moment. I am going to make—I might make separate rulings on different parts of the offer. So far as the first part of the offer is concerned, it is not proper rebuttal. Now, go ahead.

Mr. Saunders: That in the fall of 1954, when an editorial appeared in the Washington Daily newspapers which was uncomplimentary to the Association with which Harvey [fol. 1402] Dairy had nothing to do, that Mr. Torreyson was contacted by Mr. James E. Click, who has testified here previously in this trial, an officer of the defendant, and was told by Mr. Click that the article was pretty dangerous stuff, that somebody was talking out of school, and that Harvey Dairy was talking too much.

Mr. Bergson: I submit, your Honor, that that is—

The Court: That is also not proper rebuttal.

Mr. Saunders: The witness would further testify, your Honor, that in connection with contract bidding, Mr. Torreyson encountered Mr. William B. Hooper, an officer of the defendant at a dairymen's convention in Roanoke, Virginia in January of 1955 and that a comment was made about the successful bidder, Harvey Dairy, for the Fort Belvoir contract which had opened just prior to that time and that Mr. Hooper stated to Mr. Torreyson at that time at the meeting that that was the last contract Harvey Dairy would get and indicated to Mr. Torreyson that the Association would drive down the price on contract milk to keep Harvey from getting government contracts.

The Court: I am going to exclude all of this on the ground that it is not proper rebuttal and if it was admissible at all, and I express no opinion as to that, it should have been part of the case in chief.

[fol. 1403] Mr. Bergson: Your Honor, I hate to burden you. I am almost asking your advice here. I think I should make a counter offer of proof on some of this.

The Court: No, because I have excluded the evidence. The only purpose of an offer of proof is in case error is assigned on appeal to the ruling, excluding the testimony, the Court of Appeals can determine what the testimony would have been because before the system of making offers of proof was introduced, the answer of the witness to some question might have been "I don't know." I have seen that happen in other courts, in state courts.

Mr. Saunders: The offer of proof—the testimony which I made the offer on would complete Mr. Torreyson's testimony.

The Court: Very well. I take it there is no cross examination.

Mr. Bergson: No, your Honor.

(Counsel returned to counsel table, the witness resumed the stand and the following proceedings were had in open court.)

The Court: You may step down.

(Witness excused.)

OFFERS IN EVIDENCE

Mr. Saunders: Your Honor, I offer at this time Defen-
[fol. 1404] dant's admissions Nos. 781, 782,—781 through 788.

Mr. Bergson: I object to these, your Honor, on the ground that this is bringing in new matter and is not proper rebuttal testimony.

Mr. Saunders: 781 through 788, your Honor.

The Court: Yes. I see it.

(Brief pause)

Mr. Saunders: Before your Honor rules, I would like to be heard on this objection, your Honor.

The Court: You may not need to be, Mr. Saunders. Why isn't this proper rebuttal?

Mr. Bergson: It seems to me that this is a matter that should have gone in on the government's case.

The Court: No, because did you not offer evidence to the effect that there was no change so far as the general tendency was concerned in prices on government contracts? And this is evidence relating to government contracts subsequent to the acquisition.

Mr. Bergson: If that is what it is offered for, I have no objection.

The Court: Yes, I am going to admit it.

Mr. Saunders: It is offered for several purposes, your Honor, but that is good enough to get it in so far as I am concerned.

[fol. 1405] I would like to tie this in, however, your Honor, with Mr. Click's testimony yesterday.

The Court: I have admitted it.

Mr. Saunders: I would like to offer at this time, your Honor, the portion of the narrative statement which is stipulated may be accepted in lieu of testimony of Samuel H. Harvey, which reads as follows: "That about the beginning of the year 1954 he mentioned to Ralph Torreyson that he was interested in selling"—

Mr. Bergson: I object, your Honor.

The Court: Let him finish.

Mr. Saunders: "—that about the beginning of the year 1954 he mentioned to Ralph Torreyson that he was interested in selling his interest to Harvey Dairy"—this is Samuel Harvey speaking—"that in or about February, 1954 Mr. Torreyson, also Messrs. Dave Shank and Harvey Scott, who were connected with the Valley Virginia Milk Producers Association, Harrisonburg, Virginia, put up a deposit in connection with an agreement for the purchase of the business of Harvey Dairy; that although he had not informed other persons or even his employees of the impending sale, William B. Hooper, assistant manager of the Association contacted him by telephone in or about March, 1954 shortly before the transfer of the business to

[fol. 1406] the aforementioned purchasers was effected; that Mr. Hooper stated to him that he, Hooper, was in a position to offer him $25,000 more for the Harvey business"—

The Court: Just a moment. You have a statement?

Mr. Saunders: Yes, your Honor, I have.

The Court: Well, let it be marked for identification.

Mr. Saunders: Plaintiff's exhibit 17, your Honor, and I have read—

The Court: I do not think we need take time to read it. Mark it for identification, please and let me have it.

Mr. Saunders: This has been previously marked, your Honor.

The Court: Then let me have it. Are you familiar with it?

Mr. Bergson: Yes, your Honor. This is an exhibit that was offered in the government's case in chief and has already been excluded by your Honor.

The Court: Well, of course, that does not mean that that is necessarily conclusive, because an exhibit may be inadmissible at one juncture and admissible at another, depending on the posture of the case at the time it was offered.

Mr. Bergson: You excluded it on the ground that it had [fol. 1407] no relevancy to the issue under section 7.

Mr. Saunders: The portion offered, your Honor, is on the second page, the last two paragraphs only. The only paragraphs being offered are the last two paragraphs.

The Court: I will exclude this on the ground it is irrelevant so far as the issues of this case are concerned and furthermore, on the ground that it is not proper rebuttal.

Mr. Saunders: I would like to offer, and this relates to the same matter, your Honor, so I want to make it clear, the portion of Mr. Hooper's deposition which commences on page 137 and continues to page 140, that deals with this same matter.

The Court: I will make the same ruling.

I think I would like to say to counsel that I always enforce very strictly the rule that redirect examination must be strictly redirect and that rebuttal must be strictly rebuttal. That is not merely a technical ruling. It is not a technicality. Because, if you go beyond those two scopes that I have indicated, you always are likely to open up

new vistas and new issues and start the case all over again. There must be terminal facilities. And, moreover, you are likely to get to a point where—especially in a complicated [fol. 1408] case—one loses sight of the forest for the trees.

Mr. Saunders: May I have just a moment, your Honor?

(A brief pause)

Mr. Saunders: I call Mr. Burchell to the stand.

Thereupon MICHAEL H. BURCHELL was called as a witness and being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Saunders:

Q. Would you state your full name, sir?
A. Michael H. Burchell.

The Court: How do you spell your last name?
The Witness: B-u-r-c-h-e-l-l.

By Mr. Saunders:

Q. Where do you reside?
A. 501 High Street, Alexandria, Virginia.
Q. Mr. Burchell, are you the president of the Alexandria Dairy Products Company?
A. Yes, sir.
Q. That is located in Alexandria, Virginia, is it not?
A. Yes, sir.

[fol. 1409] Q. Since 1952, Mr. Burchell, from whom has Alexandria Dairy purchased its requirements of milk for resale as fluid milk?

A. Maryland and Virginia Milk Producers Association.
Q. Did Alexandria Dairy in or about 1952 or 1953 consider purchasing part of its requirements from sources other than the Association?

Mr. Bergson: I object, your Honor. This is new matter.
The Court: I am going to sustain the objection. How is this rebuttal in the first place? And in the second place,

how is it relevant to the issues even if it were proper rebuttal?

Mr. Saunders: Again, your Honor, I must restate the same matter I indicated a few moments back. The defendant has attempted to show that dealers are free to cease dealing if they choose—

The Court: They have not attempted to show any such —the Court does not understand that the defendant has attempted to show any such thing.

Mr. Saunders: I am afraid, your Honor, the record does show otherwise.

Mr. Bergson: The only thing that we have shown, your Honor, is that no dairy has a full supply contract with [fol. 1410] the Association.

The Court: Yes.

Mr. Saunders: The implications of that, your Honor, are that they are free to cease dealing when and if they choose.

The Court: No, no. I am going to sustain the objection.

Mr. Saunders: May I make an offer of proof?

The Court: Yes, you may come to the bench.

(The following proceedings were had at the bench, the witness having stepped down from the stand.)

The Court: In making an offer of proof, it is not necessary to make it as detailed as the testimony would be but just sufficient to indicate the nature of the testimony.

Mr. Saunders: The nature of the testimony would be that in or about 1952 or 1953 this witness, the president of Alexandria, considered buying from other sources than the defendant, that he indicated to the defendant that he was so considering, whereupon defendant's officer B. B. Derrick, stated that if Alexandria purchased milk from other [fol. 1411] sources, all milk purchased from the defendant would be placed in the highest classification for pricing purposes by the defendant.

The Court: I am going to adhere to my prior ruling on the ground that this is not proper rebuttal. It might have been admissible in the case in chief, although it would have been cumulative even in the case in chief.

Mr. Saunders: Might I say just one more thing in con-

nection with this offer: That because such pricing would have made it disadvantageous to buy from other sources, Alexandria Dairy Products Company did not buy from sources other than the Association.

Mr. Bergson: I might add my objections, your Honor, that while this testimony might relate to the cause of action that you dismissed, it could not possibly have any relevance to the cause of action under consideration.

The Court: No, I think it could, to show monopoly power.

Mr. Saunders: To show power, your Honor.

Mr. Bergson: Prior to the acquisition? This was prior [fol. 1412] to the acquisition.

The Court: What date was that?

Mr. Saunders: About a year and a half, roughly.

The Court: Then it is clearly irrelevant. I did not know the date. Then I will amend my ruling that it is irrelevant to the cause of action we are trying, as well as not proper rebuttal.

(Counsel returned to counsel table, the witness resumed the witness stand and the following proceedings were had in open court:)

By Mr. Saunders:

Q. In the period 1953 to the present time, Mr. Burchell, has it been the policy of Alexandria Dairy Products Company to purchase milk from independent producers of milk?

A. No.

The Court: I am going to exclude that because it is not proper rebuttal. You know, sometimes one question that takes half a minute to ask and answer, might give rise to an hour's cross-examination and I will not run that risk when this is not proper rebuttal.

Mr. Saunders: I have no further questions from this witness.

The Court: Very well. The witness may step down.

[fol. 1413] (Witness excused.)

Mr. Saunders: I offer at this time, your Honor, defendant's admissions 113, 115 and 116.

Mr. Bergson: I object to these, your Honor, on two grounds: One, that it is not proper rebuttal, and the other is that it is completely irrelevant to the issues involved in this case.

The Court: Objection sustained. This might be relevant to the second cause of action but we are trying the third cause of action.

Mr. Saunders: I offer at this time, your Honor, defendant's admissions 85 and 401.

The Court: In view of the fact they are not consecutive, I would like to take them one at a time.

Mr. Saunders: 85, first.

Mr. Bergson: Your Honor, I object on the ground that 85—

The Court: I am going to exclude that as too far back.

Mr. Bergson: That was the ground of my objection.

The Court: The other one is 401?

Mr. Saunders: Your Honor, I would like to have that read in connection with 401.

The Court: Very well.

[fol. 1414] The Court: I will admit 401 but I will exclude 85.

Mr. Bergson: I have no objection to 401. I think it is already in evidence.

Mr. Saunders: May I state why 85 is offered?

The Court: Yes.

Mr. Saunders: Because the admission No. 401 pertains only to 1954. The inference is clear, I think, if a dairy was in existence in 1947, which was the 85, it must have continued in existence to 1954.

The Court: Not at all. It might have gone out of business during those eight years. I think the presumption of continuity would not go quite that far.

Mr. Saunders: I offer at this time, your Honor, as plaintiff's exhibit No. 122 the contract awarded to Richfield Dairy Corporation by Mount Alto Veterans Hospital covering the year's period July 1, 1953 to June 30, 1954.

The Court: You have put in evidence tables covering that general information, have you not?

Mr. Saunders: Not detailed, your Honor.

The Court: But I am not going to permit—

Mr. Saunders: May I explain why this is offered?

The Court: Yes.

Mr. Saunders: On cross examination, after Mr. Hooper [fol. 1415] was asked by his counsel on direct whether the Association got information in audits as to prices which dealers bid to the Government or charged, he testified that they did not.

On cross examination he was shown a document from the Association's files with the little decimal point figures entered.

The Court: You have cross-examined him about it.

Mr. Saunders: He said he had no recollection, he did not know. These are the contracts which tie in with those figures.

The Court: I am going to exclude them because I think that is a little remote.

Mr. Saunders: I offer plaintiff's exhibit 123 for identification, abstracts of bids, and 124, your Honor, from the United States Soldiers Home in connection with procurement of fluid milk for the delivery period covering the months of March and April, 1954. It is offered for the same purpose, your Honor.

The Court: Of course, Mr. Bergson, you offered in your case tables covering that so I suppose the other side has a right to do the same thing.

Mr. Bergson: I have no objection to this going into evidence.

The Court: Suppose you hand up the exhibit. Oh, these [fol. 1416] are individual contracts. I, perhaps, misunderstood your offer. I thought you were offering an abstract. I am not going to admit individual contracts in evidence. They are not proper rebuttal and are irrelevant.

You know, gentlemen, if we start offering individual contracts, we can have hundreds of contracts—perhaps thousands—and one of the functions of the Court is to control cumulative evidence.

Mr. Saunders: I would like to direct the Court's attention at this time to plaintiff's exhibit 119 in evidence, the marked portions on page 30—

The Court: You have done that. It is in evidence.

Mr. Saunders: I have not directed the Court's attention to these particular portions, your Honor.

The Court: I know but that is not rebuttal. You can argue that if it is of importance.

Mr. Saunders: May the record show that my reference was to page 61 and page 48.

I call to the stand Mr. James O. Phillips.

The Court: May I ask what you expect to prove by him, in a general way?

Mr. Saunders: Mr. Phillips was the manager of Wakefield.

The Court: What do you expect to prove by him? I [fol. 1417] mean in a general way, do not go into details.

Mr. Saunders: That in 1957 the Association refused to allow Richfield Dairy to purchase from sources other than the defendant, insisting that—

The Court: I am going to exclude that. You have made your record by offering the testimony of—by calling Torreyson and Burchell. Do not call any other witnesses along the same line. You have protected your record by tendering at least one or two witnesses along that line and they were excluded.

Mr. Saunders: Mr. Phillips would also testify to other matters.

The Court: What other matters?

Mr. Saunders: Mr. Phillips would testify that Wakefield Dairy was never notified that the Association was selling milk to dealers at so-called contract prices.

The Court: How does that bear on this cause of action?

Mr. Saunders: Wakefield Dairy, your Honor, is one of the dairies acquired by the defendant as to which acquisition the defendant has asserted the failing-company doctrine.

The Court: Yes. I do not think that is proper rebuttal [fol. 1418] or relevant.

Mr. Saunders: The proof would be that Wakefield Dairy was the victim of discrimination by the defendant in the

sale of milk which could materially affect the fact that it was a failing company.

The Court: Well, I think I will let you offer that.

Thereupon JAMES O. PHILLIPS was called as a witness and being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Saunders:

Q. Would you state your full name, please?

A. James Otto Phillips.

The Court: What is your name, sir?

The Witness: James Otto Phillips.

By Mr. Saunders:

Q. Where do you reside, Mr. Phillips?

A. 2700 Spencer Road, Chevy Chase, Maryland.

Q. Were you the general manager of Wakefield Dairy in the period 1953 to 1957?

A. I was.

Q. Directing your attention now, Mr. Phillips, to the [fol. 1419] approximate period late 1953 to the year 1954 and early 1955, was Wakefield Dairy notified at any time during that period that the Association would offer to dealers milk at so-called contract prices for resale to Federal installations?

A. In 1954—

The Court: Just a moment.

Mr. Bergson: I object, your Honor. This does not cover the period that Mr. Saunders said he was going to offer this testimony.

The Court: Objection sustained.

Mr. Saunders: I do not recall having made any statement as to a period.

Mr. Bergson: You said 1957.

The Court: Objection sustained, anyway.

By Mr. Saunders:

Q. During the period 1953 to 1957, Mr. Phillips, was it the policy of Wakefield Dairy or of Richfield Dairy while you were connected with it, to buy milk from independent producers for resale as fluid milk?

The Court: You have that in your case in chief. You showed in your case in chief that this was an independent dairy, so let us not repeat.

Mr. Saunders: When I say "independent," your Honor, [fol. 1420] I am referring to independent producers rather than any one independent of the Association. The question is directed to so-called separate single independent producers.

The Court: I do not think that is relevant.

Mr. Saunders: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Saunders: I call Mr. Hooker to the stand.

The Court: You are not calling any more witnesses along the same line that I have excluded?

Mr. Saunders: I must confess, your Honor, this has a relation to matters which your Honor has excluded.

May I make an offer of proof?

The Court: No. You have protected your rights by calling one witness, making an offer of proof and I have excluded it.

Mr. Saunders: This is somewhat different. I say it is related but it is somewhat different.

The Court: What do you propose to show?

Mr. Saunders: I propose to show by this witness that after Harvey Dairy notified the Association that it would cease purchasing, that the Association, together with Chestnut Farms Dairy, mapped out a government sales bidding [fol. 1421] campaign which would exclude Harvey Dairy from government contracts.

The Court: That who mapped it out?

Mr. Saunders: Chestnut Farms Dairy, your Honor.

Mr. Bergson: This is a novel charge.

The Court: I am going to exclude that as not proper rebuttal. I express no opinion as to whether it would have

been admissible in the case in chief but it is not proper rebuttal.

Gentlemen, I do not permit cases to be tried in rebuttal and surrebuttal.

Mr. Saunders: I offer—

The Court: I think you have got enough, Mr. Saunders. Now, how much more are you going to have?

Mr. Saunders: The remainder of the Government's evidence will be largely based upon requests for admissions, with the exception of this one. It will pertain to the fact that defendant over the period 1954, somewhat in 1955 and into 1956 discriminated amongst its customers, the victims of which were Richfield and Wakefield Dairies.

The Court: How is that relevant and how is that proper rebuttal? I am asking you a two-pronged question.

Mr. Saunders: Your Honor, may I answer the latter first?

The Court: Yes, you may.

[fol. 1422] Mr. Saunders: The defendant asserted—we showed an acquisition of Richfield-Wakefield. Then the defendant asserts the failing-company doctrine. Which raises something we have to meet where the burden of proof now shifts to us, we believe, to show that in part, at least, the failing company—the company became failing because of what the Association did to it.

The Court: Well, I think that the evidence which you propose to offer is too remote on that issue. Of course, that would be proper rebuttal, yes, but I think this is too remote.

Mr. Saunders: Your Honor, in order to protect the record, may I make a written offer as to what we would—

The Court: Yes, you may make a written offer of proof and hand it to the reporter and he will include it in the record.

Mr. Saunders: May I have an opportunity to do that later today?

The Court: Yes, indeed.

Mr. Saunders: Thank you.

[fol. 1423] (Plaintiff's Written Offer of Proof is as follows:)

Plaintiff's Offer of Proof

Plaintiff's offer of proof of defendant's discriminations against Richfield Dairy Products Corporation and Wakefield-Model Farms Dairy, proof consisting largely of facts admitted by defendant, together with certain documents from defendant's files and certain government milk supply contracts:

1. Plaintiff would show through Admissions 128, 561-566, 778, 779, and 1049, and National Institutes of Health milk supply contract SA-43-ph-1186 (nih) (Pl. Exh. 125) that, following a change in defendant's Class I price from $5.99 to $6.22 in July 1956, defendant continued to sell milk to Chestnut Farms Dairy for resale on government contracts at $5.99 while charging Wakefield $6.22 for milk resold by it at National Institutes of Health.

2. Plaintiff would show through Pl. Exh. 126 that Wakefield Dairy was not notified, as were Chestnut Farms Dairy, Richfield Dairy, Thompson's Dairy, and defendant's Embassy division, that defendant would sell milk for resale at Walter Reed Hospital during March 1955 at a price of $6.22, without the premium applicable to other Class I [fol. 1424] sales.

3. Plaintiff would show through Walter Reed contract DA-49-165-MDW-402 (Pl. Exh. 127) that Wakefield Dairy was awarded the contract to supply milk to that installation in May and June 1954. Admissions 1458-1475, together with Admission 128, shows defendant charged Wakefield the Class I price for said milk. Pl. Exh. 121 shows that defendant had established the price of $4.50 as the price at which it would sell milk for resale at Walter Reed.

4. Plaintiff would show through Admissions 432-440, 450-471, 734, 740, 741, 742 and 744 that during the period October-December 1954 defendant charged Chestnut Farms Dairy at the rate of $6.17 or $.46 less than the full Class I rate for milk resold by Chestnut to National Institutes of Health, Veterans Administration (Mt. Alto) Hospital, St. Elizabeths Hospital and Walter Reed Hospital, all located in the District of Columbia. Admission 459 shows that on September 15, 1954, defendant established the full Class I price as the price for which it would sell milk for resale at

federal installations in the Washington metropolitan area during the period October-December 1954. Admission 1539 states that the full Class I price is Class I plus applicable [fol. 1425] premiums. Admission 1109-1114 show that Chestnut Farms and Richfield Dairy were each awarded a contract by National Institutes of Health during the applicable period. Exhibit 94 shows that Richfield purchased its total milk requirements from defendant during this period. Admissions 1040-1041 show that defendant charged Richfield the full Class I price for milk utilized by it in supplying NIH.

Admissions 1115-1117 show Richfield, Wakefield and Chestnut bidding on the Mt. Alto contract for the same period, with Chestnut receiving the award.

Admissions 1119-1124 show Richfield and Chestnut bidding on the St. Elizabeths contracts for October and for November, with Chestnut receiving each award.

Admissions 1125-1129 show that Richfield, Wakefield and Chestnut bid on the Walter Reed contracts during the same quarter, and that Chestnut was awarded one contract. Pl. Exh. 128 shows Richfield awarded and served the other contract. Admission 1037 shows that Richfield was charged the full Class I price by defendant for milk resold by it to Walter Reed.

Testimony by James Otto Phillips, manager of Wakefield Dairy during the period 1953-1957, would be that Wakefield was not informed by defendant of any special prices at which defendant would sell milk for resale on [fol. 1426] government contracts during the latter part of 1953, 1954, and early 1955; that the witness inquired of Hooper late in 1953, shortly before submission of bids for the first quarter of 1954, concerning prices for contract milk; that Hooper told him defendant was giving no special prices at that time, but would inform him if defendant should do so in the future. Pl. Exh. 121 shows that defendant did in fact sell milk for government contract use at less than the Class I price.

James E. Click, defendant's employee, would testify with respect to Plaintiff's Exhibit 126 that the handwritten notation in the upper left hand corner showed to which dairies the price notification contained in the document was sent.

[fol. 1427]

OFFERS IN EVIDENCE

Mr. Saunders: I offer at this time plaintiff's interrogatory—the defendant's answer to plaintiff's interrogatory No. 5 of February 21, 1958. That is a table of so-called blend prices, your Honor.

The Court: I think that is proper. It might have been in the case in chief but I think it is innocuous.

Mr. Saunders: I offer defendant's admission No. 119, your Honor. I might say, I do not particularly desire to put in the data in the earlier period. I am satisfied at this point at least, if the data is restricted to the years 1953, on.

The Court: It will be admitted.

Mr. Bergson: We have no objection.

Mr. Saunders: That completes the government's rebuttal evidence.

The Court: Very well.

Both sides rest?

Mr. Bergson: Defendant rests, your Honor.

The Court: Now, gentlemen, I want to say this now that both sides have rested. The Court feels indebted to both counsel and their associates for the very able and lawyer-like manner in which this trial has been conducted. I do feel this, that neither counsel has wasted any time or introduced anything extraneous into the case and I think [fol. 1428] I, also, am indebted to counsel for their cooperation during the discovery proceedings. I think the way the discovery was conducted is a model for other litigations.

Now, do you gentlemen care to argue the matter orally? I want to say this, that a prolonged argument such as was had at the trial of the separate defense was helpful then. Very helpful to the Court. I do not think such a prolonged argument would be helpful here because here the issues are narrow and a great many of the points were threshed out as we went along. But if counsel care to argue the matter, of course, the Court will be glad to hear them.

Mr. Saunders: As your Honor had requested, the Government has prepared a summary of the evidence and we are prepared to argue it whenever your Honor suggests.

The Court: Of course that summary would be very helpful indeed. I want to say that I think I made my request

before Mr. Bender testified and Mr. Bender's testimony, that is, the statistical part of it, has been very, very helpful to the Court in bringing together a lot of the evidence. But the summary that you have prepared will be very helpful.

Do you wish to argue the matter orally?

[fol. 1429] Mr. Bergson: Your Honor, I think I would like to be heard briefly about half an hour. No longer than that.

The Court: Yes. I was just going to suggest, gentlemen, that if you really want to help the Court, a thirty-minute argument a side would be much more helpful than a long one.

Mr. Bergson: I am sure that I can say all I have to say in thirty minutes.

The Court: Is that agreeable to you, Mr. Saunders?

Mr. Saunders: Approximately thirty minutes will be agreeable, your Honor.

The Court: Very well. I will hear you this afternoon. I am going to recess the trial at this time because I am going to take up another matter, another short matter before we recess for lunch. So you gentlemen will be excused until 1:45, that will give you a little time to gather your thoughts.

Mr. Bergson: And I assume, your Honor, we will be permitted to submit briefs at this time?

The Court: No, oral argument takes the place of briefs. I am going to decide this case from the bench.

Mr. Bergson: Your Honor, may I say that we have [fol. 1430] the brief ready?

The Court: Oh, then you may submit it.

Mr. Bergson: We have the brief all ready and I would like to hand it up to you promptly.

The Court: You may hand it up now.

Mr. Bergson: I do not have it in court.

The Court: Then suppose you hand it up at 1:45 and a copy to the other side of course.

Mr. Bergson: Of course.

(At 12:15 p.m. the trial was recessed until 1:45 p.m.)

[fol. 1431]

AFTERNOON SESSION

(Thereupon, at 2:00 o'clock p.m., the trial was resumed.)

The Court: Before you proceed with your argument, I want to call attention to an observation I made at the very close of the morning session.

I referred to the fact that the Government's statistician, Mr. Bender, brought together a great deal of the evidence which made it much simpler for the Court. I know I should have mentioned, and I intended to mention, that Mr. Click, the defendant's statistician, did likewise, so, between the two statisticians, the Court has been very much helped by having the figures brought together.

I notice that there is not too much difference between the two sets of figures and it is only a question of inferences to be drawn. As a matter of fact, throughout this whole trial, I was rather pleased to note that there was very little dispute as to facts; very little aspersion on anybody's veracity and, in fact, I do not recall any aspersions on anybody's veracity.

We will proceed with the oral argument. I suggested a half an hour to a side which I understand is satisfactory to both of you. I want to say, however, I do not expect to hold you down to the minute.

[fol. 1432] You may proceed, Mr. Saunders.

Mr. Saunders: I have asked the Clerk to hand to the Court a summary of the evidence which the Government has prepared, in so far as possible to do so, Your Honor, with the available record. We have tried to cite the pages of the exhibits to which reference is made.

The Court: I think we have had an excellent transcript here, especially considering the promptness with which it was delivered and it was very accurate and it has been very helpful to have it each evening. I think both reporters are entitled to a great deal of credit for it.

CLOSING ARGUMENT ON BEHALF OF THE GOVERNMENT

Mr. Saunders: As Your Honor is, of course, familiar at this time, this is a proceeding brought by the United

States of America which, for the purposes of this argument, is confined to the alleged violation of Section 7 of the Clayton Act by the defendant, Maryland-Virginia Milk Producers Association.

The acquisitions involved here are defendant's acquisition of substantially all of the assets of Embassy Dairy, Inc., in July of 1954 and also the defendant's acquisition of the stock of Richfield Dairy Corporation and Wakefield Dairy. The latter is a corporation trading under the name of "Wakefield Dairy" being by name "Simpson Brothers, [fol. 1433] Inc."

It is alleged by the plaintiff, United States, that these acquisitions have had or may have the effects proscribed by Section 7 of the Clayton Act, that is, that there may be, any line of commerce in any section of the country, the effect of substantially lessening competition or tending to create a monopoly.

The defendant, Maryland-Virginia Milk Producers Association, Inc., is a Maryland corporation having its principal office in the District of Columbia. It is an agricultural cooperative association, having as members nearly 2,000 milk producers most of whom are located in the area adjacent to the Washington metropolitan area. In that area, most of the milk produced by members of defendant is sold eventually to dealers whose plants are located therein.

The net worth of the defendant is approximately $5 million. In the period 1953 to 1956, its total sales consistently exceeded $33 million.

When we speak of the Washington metropolitan area, as we have been speaking of it throughout this trial, we have referred to the counties in Maryland, Prince Georges and Montgomery; the counties in Virginia, Arlington and Fairfax; two cities in Virginia, Alexandria and Falls Church, and to the District of Columbia, itself. That area, I think, [fol. 1434] and there is no question and I believe the defendant has conceded, is a milk market unto itself.

The Washington metropolitan area constitutes an important and substantial market for milk for fluid utilization. Over 567 million pounds of milk are delivered each year to dealers located in this area. At the time of the acquisition of Embassy Dairy, in 1954, there were 12 dealers

located in this area. As of January 1, 1958, following the acquisition of Richfield-Wakefield dairies by the defendant, the number of such dealers had been reduced to 10. This substantial reduction in the number of competing dealers occurred during a period of increasing population in the Washington metropolitan area.

Most of the total of dealers' requirements of milk for resale as fluid milk in the Washington metropolitan area has been and is supplied by producers, by producer cooperative associations, located in the production areas to which I have referred. From time to time, as the evidence has shown, milk has been transported into the Washington metropolitan area from more distant production areas.

In 1953 and in the first six months of 1954, in excess of 95 per cent of all milk supplied dealers in the Washington area for resale as fluid milk was supplied by producers and producer cooperative associations whose members were [fol. 1435] located in the States of Maryland, Virginia, West Virginia, and Pennsylvania. Only three per cent of the milk sold as fluid milk in the Washington metropolitan area has, during the period which has been considered at this trial, come from outside the Washington metropolitan area. Thus it may be seen that commerce in the sale of fluid milk in the Washington metropolitan area is little affected by the sales of fluid milk by dealers located outside of this area.

Thus, the evidence shows that the Washington metropolitan area is a "section of the country" within the meaning of that term as used in Section 7 of the Clayton Act.

So-called Class 1 and Class 2 milk, or its equivalent known by other names, are fluid classifications in the Washington milk market. Milk not required for fluid utilizations is sold at lower prices than milk utilized for sale as fluid milk. Milk for resale as fluid milk and fluid milk are each "lines of commerce" within the meaning of Section 7 of the Clayton Act.

Section 18 of the District of Columbia Milk Act requires all persons licensed under that Act to receive for sale in the District of Columbia only milk which is produced on District of Columbia licensed farms. All dealers who resell milk as fluid milk in the District of Columbia must obtain District of Columbia licensed milk.

[fol. 1436] In 1953, '54 and '55, there were eight such licensed dealers. In 1956 and '57, there were seven such dealers. The requirements of these dealers were thus marked with a distinguishing characteristic. The milk and the only milk which could fill the requirements of such dealers is sufficiently distinct to render it a separate "line of commerce" within the meaning of that term as used in Section 7 of the Clayton Act.

Fluid milk processed from District of Columbia licensed milk was and is likewise a "line of commerce."

Embassy Dairy, Inc., was a Delaware corporation and had its offices and plant located in the District of Columbia for some time prior to July of 1954. In the period 1950 to 1954, Embassy Dairy, Inc., engaged in the distribution and sale of fluid milk in the District of Columbia and in counties of the States of Maryland and Virginia within the Washington metropolitan area.

Both defendant and Embassy Dairy, Inc., were, as of May 26, 1954, the date upon which the agreement of acquisition was entered into, and on July 26, 1954, the date of the transfer of Embassy's assets to the defendant corporation, engaged in commerce as that term is defined in the Clayton Act.

In 1954, the Embassy Dairy was the fourth largest dealer [fol. 1437] in fluid milk in the Washington metropolitan area when considered on the basis of relative dealer purchases of milk for resale as fluid milk. Embassy procured its requirements of milk for resale as fluid milk principally from approximately 122 farmers who were not members of the defendant and who supplied their milk directly to Embassy.

These independent producers tended, on the average, to be somewhat larger producers than members of the defendant. Embassy also obtained milk from suppliers not located in the Washington milk shed. Embassy obtained relatively small amounts of milk from the defendant in months as to which evidence has been introduced, and in certain months, at least, it obtained no milk from the defendant.

Embassy's sales of milk and dairy products amounted to approximately $8 million a year prior to acquisition.

Embassy Dairy, Inc., purchased approximately ten per cent of all milk for resale as fluid milk in the six months' period, January to June, 1954. In that same period defendant sold approximately 85 per cent of all milk sold to Washington metropolitan area dealers for resale as fluid milk.

Approximately 87 per cent of all milk required by Washington metropolitan area dealers in the period immediately [fol. 1438] prior to the acquisition was District of Columbia licensed milk. Defendant's share of this market amounted to approximately 85 per cent. Embassy Dairy Inc.'s requirements of District of Columbia licensed milk amounted to approximately 8 to 9 per cent of the total.

Purchases of fluid milk by the Federal Government in the Washington metropolitan area have been and are substantial. During the period 1953 to 1957, such purchases have averaged over $2 million a year. These purchases are made to provide supplies of fluid milk to the various Federal installations and institutions in the Washington metropolitan area.

The requirements of the Federal Government for supplying these institutions with fluid milk has been in excess of 10 million quarts per year.

With respect to the contract business, that is, as it has been referred to during the course of the trial, in 1953, Embassy Dairy, Inc., supplied almost 50 per cent of all fluid milk required by Federal installations in the Washington metropolitan area. In the first six months of 1954, Embassy Dairy, Inc., supplied almost 48 per cent of such requirements.

As to the defendant and its connection with Government contract sales during 1953, the defendant was the original [fol. 1439] source of supply of approximately 47 per cent of all milk supplied dealers for resale as fluid milk to Federal installations in the Washington metropolitan area.

In the first six months of 1954, defendant was the original source of supply of approximately 45 per cent of all such milk.

The evidence shows that approximately six months prior to the making of the agreement, which culminated in the acquisition complained of by plaintiff in the Embassy part

of the case, defendant attempted to block the opening of a distribution station in Fairfax, Virginia, by Embassy Dairy, Inc. A director of the defendant stated that the defendant's opposition was based on the fact that Embassy did not purchase all of its milk from defendant; that it obtained milk from the West and from the Eastern Shore of Maryland and, further, that Embassy sold what the Association considered to be inferior milk.

Not only did Embassy Dairy, Inc., purchase little of its requirements of milk from defendant; to the chagrin of defendant, Embassy urged revisions of the District of Columbia Milk Act and Regulations. In a resume of the proposed purchase of Embassy, issued after the acquisition agreement had been made, but prior to the acquisition itself, defendant's officer, Hooper, set out as the first reason [fol. 1440] for the acquisition the efforts of Embassy to have the District of Columbia Milk Act and Regulations modified.

A second reason for the acquisition assigned by Mr. Hooper was the fact that Embassy's ability to buy cheap milk from other than District of Columbia licensed sources, as well as from District of Columbia licensed independent producers, had taken considerable sales away from dealers buying milk through the defendant.

Mr. Hooper stated, in the resume, that as a result of Embassy's ability to under-buy and, therefore, under-cut in its bidding on Government contracts, defendant had been forced to drop its price for contract milk to "a competitive level."

Embassy was a price-cutter. It was a liberal discounter. Government contracts which were obtained by Embassy were ordinarily based upon a lower cost of product than the prices ordinarily charged by defendant and this was passed along, at least in part, to the Government. Embassy was an innovator. It was one of the first dealers in the Washington market to offer a number of new dairy products.

In a memorandum attached to defendant's application for a loan from the Baltimore Bank for Cooperatives to finance the acquisition of Embassy, defendant summarized [fol. 1441] its reasons for the acquisition and, after stating

that the net return to its members was superior to that in any other milk market in the country, the defendant then stated why it needed this acquisition and the reasons were three-fold:

One. To eliminate milk brought in from other milk markets.

Two. To replace the outside milk or non-association milk with association milk; and

Three. To obtain an increase in members estimated at between 60 and 70 in number.

The memorandum also emphasized that the purchase of Embassy would eliminate, and I am quoting from the document, "a disturbing influence which has been a thorn in the side of the Association for many years."

That the acquisition was intended to remove a competitive factor, as well as an outlet for competing milk, was repeatedly emphasized in conferences between Association officials and others. Officials of Thompson's Dairy were informed that Association milk would replace independent milk at Embassy; that it was part of the deal that the Embassy shippers should go to Baltimore; that Embassy would not bid on Government contracts and that Embassy would cease giving the discounts which Embassy Dairy, Inc., had been giving.

The agreement of acquisition was signed on May 26, 1954. [fol. 1442] A condition of the agreement was that the independent producers who had been supplying milk to Embassy would be transferred to the Baltimore market where Green Spring Dairy, the parent corporation of Embassy, was engaged in the fluid milk business. Although this condition was allegedly insisted upon by Mr. Ward, the Association itself required Mr. Ward to go through with the entire agreement when Mr. Ward subsequently sought to withdraw therefrom.

That it was desirable from defendant's standpoint that the independent producers leave the Washington market is clear from defendant's stated purpose of the acquisition. In view of statements by defendant's officer Hooper and the purchase of milk to supplement its members' production,

testified to by Mr. Click, the defendant's alleged business justification for the acquisition, namely, to relieve its surplus problem, seems entitled to little weight.

There was more to the agreement relative to the former Embassy shippers than defendant would have the Court believe. The testimony of Arthur Lee Thompson of Thompson's Dairy was to the effect that Mr. Hooper told him that any action by Thompson's to take on any of the independent producers would "queer the deal." Robert Rawlins, of the same firm, testified that Mr. Hooper said that the sale of Embassy depended on the independent pro-
[fol. 1443] ducers going to Baltimore and clearly indicated that Thompson's should do nothing to "upset the negotiations." Although Mr. Remsberg, the defendant's president, testified that the first discussions concerning the future status of the Embassy producers took place at the May 26 signing of the acquisition agreement with Mr. Ward, defendant's May 5, 1954 memorandum to the Bank refers to the anticipated addition of 60 to 70 new members, a figure remarkably close to the final result for an estimate made prior to any discussions of the matter.

In July of 1954, Association milk began moving in quantity into the Embassy plant. Although defendant was selling milk to other dealers on a classified price basis in that month, milk was sold to Embassy Dairy, Inc., on the so-called blend price basis. This discriminatory pricing was engaged in by the defendant to facilitate Mr. Ward's moving of the independent producers out of Embassy.

On July 26, 1954, substantially all of the assets of Embassy Dairy, Inc., were bargained and sold to the defendant. The defendant commenced operation of the Embassy plant almost immediately. The total purchase price was approximately $3,800,000 and an additional $262,000 of working capital was supplied the Embassy Division of defendant. No milk, other than Association milk, has been received in or distributed from the Embassy plant since July, 1954.
[fol. 1444] Upon the acquisition, the independent producers who had been supplying milk to Embassy Dairy, Inc., had virtually no alternatives but to transfer to the Baltimore market or to affiliate with the defendant. In either event, the competition of such producers with defen-

dant was eliminated as a direct consequence of the acquisition. Neither Thompson's Dairy, which was buying some milk from independent producers, nor Capital Milk Producers Association, a competing cooperative, could accommodate any substantial number of producers who found themselves without an outlet.

As the testimony indicated this morning, other dealers in the market had a policy of not purchasing milk from independent producers. When Thompson's Dairy gradually took on some of these producers within the next several years, and Mr. Rawlins testified it could only be done gradually because of the problem of integrating them into the truck and hauling routes, the defendant put into effect a policy, which, as Mr. Rawlins described it, "slowed me down considerably in taking any other milk on."

The acquisition resulted in the immediate elimination as independent suppliers to the Washington market of all but 14 of the independent producers who had supplied milk [fol. 1445] to Embassy Dairy, Inc. Even by the end of 1955, only 23 of such producers were independently supplying their milk to the market and although a few additional such producers did regain their status, namely, as independent suppliers, mainly shippers to Thompson's Dairy, since the acquisition a total of no more than approximately 46 or 50 of the 122 former shippers to Embassy has at any time supplied milk to the Washington market independently of the defendant.

Prior to the acquisition of Embassy Dairy, non-Association producers, as a practical matter, could look to only three dealers as an outlet for their milk in the Washington market. Embassy Dairy, Inc., represented by far the largest such outlet for independent milk. The acquisition of Embassy Dairy by the defendant has removed permanently the only substantial outlet in this market for non-Association milk. This outlet has accounted, on the average, for about ten per cent of the milk purchased for resale as fluid milk. The acquisition of Embassy's assets adversely affects the ability of the defendant's competitors to market their milk in the Washington metropolitan area and this outlet has been completely foreclosed to persons not members of

the defendant or who do not choose to do business on defendant's terms.

In accordance with the stated purpose of the acquisition [fol. 1446] to raise contract milk prices to Class 1 and to raise prices generally, the defendant immediately eliminated reductions in the prices of milk for Government contracts upon the acquisition.

Upon the acquisition of Embassy, the defendant increased its share of the market from 85 per cent to approximately 95 per cent. Although defendant's percentage of milk sold to dealers for resale as fluid milk has declined since the acquisition, it is clear that the acquisition, and this is from the testimony of Mr. Hooper, was, in part, undertaken in anticipation of a reduction in sales and if defendant's share of the market is adjusted to allow for the anticipated reduction, the Embassy acquisition results, even today, in a net gain in market sales of more than three per cent. In any event, the acquisition has permitted defendant to retain a market position of 86 per cent by means not related to competitive merit or superiority or price advantages of its product in the sale thereof.

With the acquisition of Embassy's assets, defendant's percentage of all milk supplied dealers for resale as fluid milk to Federal installations in the Washington metropolitan area increased precipitously from 45 per cent to 92 per cent and between the acquisition and December 31, 1957, has averaged about 75 per cent compared to the [fol. 1447] former figure of below 50 per cent.

The acquisition increased defendant's percentage of District of Columbia licensed milk supplied District of Columbia licensed plants from approximately 85 per cent to approximately 94 per cent in the balance of 1954 following the acquisition. Since the acquisition, the percentage of such sales has averaged over 90 per cent.

The evidence, we believe, shows that defendant's custom of auditing its competitors' books each month provides the defendant with a source of detailed information about the purchases and sales of its competitors which is of incalculable competitive advantage. The power to use this information to police its competitors is present and the probability that the defendant will so use it, once this

litigation is concluded, is evidenced by the Association's past expressed intention to eliminate any "thorn in the side of the Association."

The defendant has operated its Embassy Division at substantial losses since the acquisition. In the post-acquisition period, August to December, 1954, the net operating loss was almost $400,000. It has run in that same area each year since and, according to Mr. Remsberg, the defendant's president, it is immaterial whether or not the Dairy loses money for, as he said, "it is only a means to an [fol. 1448] end as far as the Association is concerned."

The implications are obvious as to the unfair competitive advantage defendant enjoys over competitors in its distribution operations.

The true purpose and effect and the probable effects of defendant's acquisition of the Embassy assets are outlined in a document written six months after the acquisition by defendant's officer Derrick. In this document, Mr. Derrick stated that Embassy was bought for defendant's "self-protection" and because "everyone in the distributing field would be happy to have them out of the market."

The Court: Do you know what exhibit that was?

Mr. Saunders: That is Plaintiff's Exhibit No. 48, record page 304.

That document concluded with the recommendation that the purchase of a distributing plant be executed only in a case "where the elimination of the plant as an independent buyer would furnish an outlet for a sizeable amount of milk."

To establish a violation of Section 7, the Government does not need to prove an actual lessening of competition or an actual tendency to create a monopoly, as the Court observed in the course of the trial. Section 7 is concerned with and directed at preventing the obtaining of power to lessen [fol. 1449] competition.

In the Du Pont case, the Court said, at page 589:

"The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended."

And at page 597, quoting:

"The aim of Section 7 was primarily to arrest apprehended consequences of intercorporate relationships before

those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case."

The acquisition of Embassy Dairy by the defendant has given the defendant the very kind of power to lessen competition at which Section 7 is directed. That is, in addition to the actual elimination of a substantial number of competitors of the defendant which has already resulted in an actual lessening of competition, the defendant now, by virtue of its participation in retail distribution of fluid milk, now has the power to eliminate or materially injure those few remaining dealers in the market who do not purchase their milk from the defendant Association. That the defendant has not done this may be, in part, attributable [fol. 1450] to self-restraint brought about by the investigation and filing of this proceeding.

In the Du Pont case, the Court held that the partial stock interest, a 23 per cent interest, which Du Pont had acquired in General Motors, gave Du Pont the power or the potentiality to lessen competition by pre-empting substantial portions of General Motors' purchases of fabrics and finishes. That is, by virtue of the stockholdings in General Motors, competitors of Du Pont would not have an equal opportunity to compete for General Motors' business on the merits of their products.

In this proceeding, the defendant, by outright purchase of the Embassy Dairy's assets, has permanently deprived its competitors of the opportunity to compete for the substantial share of the market formerly represented by the Embassy Dairy, Inc.

As the Supreme Court said in the Du Pont case, at page 607:

"The statutory policy of fostering free competition is obviously furthered when no supplier has an advantage over his competitors from an acquisition of his customers' stock likely to have the effects condemned in the statute."

[fol. 1451] The defendant has stressed the fact that today the Association's over-all percentage, 85 or 86 per cent, of total sales to dealers in the Washington metropolitan area is no greater than it was just prior to its acquisition of

Embassy Dairy and, therefore, there has been no lessening of competition. As I indicated earlier, the acquisition was undertaken in anticipation of a loss of some of that business and then the defendant turns around and says, "because we lost it, the acquisition has not had any effect."

This position completely misconstrues the nature of the inquiry which is controlling in a vertical acquisition case. In a vertical acquisition case, the focal point is the fact of foreclosure of competitors from a substantial share of the relevant market and not whether the acquiring firm's percentage in the over-all market has, in fact, increased or not.

In the Du Pont case, there is no reference as to the effect of Du Pont's purchase of General Motors' stock upon the over-all market share of Du Pont in automobile fabrics and finishes. The Court's attention was directed solely at that share of the market represented by General Motors' purchases of the relevant products and to the determination of whether competitors of Du Pont were potentially foreclosed or not from competing for General Motors' business.

[fol. 1452] The defendant's contention that the acquisition of Embassy Dairy is lawful cannot be sustained. Its invalidity can be easily demonstrated. Under defendant's theory, it could acquire another outlet in the market, an outlet not dealing in Association milk, which outlet, perhaps comparable to Embassy in competitive vigor, is a substantial outlet in the market for non-Association milk and if the remaining competitors not dealing in Association milk fight back vigorously and if, at some subsequent point, the Association's share of the market falls back again the Association would say, consistent with their theory, "Well, there has been no effect of this acquisition."

Eventually, all outlets in the market would be reduced and, of course, this sort of concentration in the number of suppliers, the elimination of competitive vigor, is actually what Section 7 is directed at.

In summary, the Government contends that the acquisition of Embassy Dairy's assets by the defendant has resulted in a foreclosure to competing suppliers of a substantial share of the market for milk for fluid utilization in

the Washington metropolitan area and that there have also been the proscribed effects upon competition in the distribution level of the industry.

With respect to the Wakefield-Richfield acquisition, there, [fol. 1453] of course, also the defendant obtained or foreclosed competitors from the share of the business picked up upon the acquisition of Richfield and Wakefield.

Your Honor has commented earlier, in the course of this trial, and I must say that, in view of the exclusion of certain evidence, the Government feels that there is little left to be commented upon with respect to the evidence as related to the Richfield-Wakefield transaction, it is as simple as this, so far as the Government is concerned: The defendant, itself, in large measure, brought Richfield and Wakefield into the failing company situation. In any event, those acquisitions, which were not only vertical but horizontal, had the effects prohibited by Section 7.

[fol. 1454]

Closing Argument on Behalf of Defendant

Mr. Bergson: May it please the Court: I have no intention in my argument of reviewing the evidence that has come before you in detail. I think, as your Honor indicated before the argument started, there is no real dispute on the relevant matters of evidence which bear upon the ruling that must be made in this case.

What I propose to do in my argument, if I can, is to direct my attention to the points which I believe, during the course of the trial, you have indicated that you are most interested in.

I believe that the primary point in which you are interested is whether, as a result of the acquisition of Embassy Dairy, the Defendant has acquired the power to substantially lessen competition or tend to create a monopoly in any phase of the milk business in the Washington Metropolitan Area.

The Court: Before you enter upon a discussion of the subject, I notice that in your brief you refer to the opinion of the Second Circuit in the American Crystal Sugar case which was handed down only on the first of

October and, therefore, is not reported. I was wondering whether anyone had a copy of the opinion available?

Mr. Bergson: It is in "Law Week", your Honor.

[fol. 1455] The Court: I have the "Law Week" but the "Law Week" naturally would have only an extract.

(Mr. Saunders handed up a document to the Court.)

The Court: Thank you, Mr. Saunders.

You may proceed.

Mr. Bergson: Now, as your Honor knows, prior to the acquisition of Embassy Dairy, the Maryland and Virginia Milk Producers Association were engaged solely in the business of marketing its members' milk. That is, selling raw milk to distributors or dealers, as they have been called, located in the Washington metropolitan area.

The Association, itself, prior to the acquisition, never engaged in the resale of fluid milk or the sale of fluid milk which, as defined in the complaint, is pasteurized milk and which is sold in bottles to consumers, to Government installations, or otherwise.

So, in effect, and in fact, as your Honor pointed out during the course of the trial, the acquisition by the Association of Embassy Dairy was a vertical acquisition. It put the Association in a phase of the milk business that it had never been in before.

Now, I am not going to waste time defining the statute. I am sure your Honor is as familiar with it as anyone, but the test under the statute is whether the acquisition of Embassy Dairy gives the Association such power that there [fol. 1456] is a reasonable probability, a reasonable probability—not a mere possibility as stated in the du-Pont case—of restraint of trade or monopoly.

And, that the test in considering that is not a mere quantitative test, where you add percentage to percentage, but a qualitative test where you ascertain the economic factors and stresses resulted from such acquisition.

Now, in applying this test, what factors should be looked at? First, again according to the duPont case, it is the situation as it exists at the time of trial, not at the time of acquisition. This principle was again enunciated in the Cyrstal Sugar case.

The Court: I think the Government has a right to predicate its rights either on the situation as it existed at the time of the acquisition or the time of trial, because the innovation—and it was an innovation—of the duPont case, in permitting the adjudication of rights as of the date of institution of suit, was an extension of the law as it previously existed. It was not a substitution of something for something that previously existed.

Mr. Bergson: I do not agree with your Honor. The duPont case, while I have cited it because it seems to be a case that has been bruited about quite considerably [fol. 1457] during the course of this trial, did not, I think, produce a new rule as to how you determine the reasonable probabilities. If suit were brought immediately after the acquisition and you had to make your test of reasonable possibilities on forecasts, that is one thing. But we have the experience of four years with which to measure the probabilities of the acquisition.

The Court: When does the cause of action arise?

Mr. Bergson: The cause of action, I would imagine, arises when the acquisition has the possible effect of lessening competition. I do not think the mere acquisition gives rise to the cause of action.

The Court: Would you not say that, if the acquisition as of the date of the acquisition is of such a character as to indicate reasonable probability of lessening competition or creating a monopoly, the cause of action arises as of that date?

Mr. Bergson: I cannot say that I would concede that, your Honor.

The Court: Is there any other case besides the du Pont case which held that the situation must be determined as of the date of the filing of suit instead of the date of acquisition?

[fol. 1458] Mr. Bergson: The American Cyrstal Sugar case says that you must take into consideration the long-range effects of the acquisition.

The Court: Long-range effects; is that not a little different from saying that the situation must be judged as of the date of the filing of suit? I should not think anyone would dispute that long-range effects begin from the date of acquisition and you go as far as you reasonably can.

Mr. Bergson: Your Honor, I would submit that in the du Pont case, there probably was no cause of action at the time of the acquisition.

The Court: I do not think there was, either. But I do not construe the du Pont case as meaning or as holding that the situation existing at the time of filing suit is the exclusive test. I rather construe it as an extension of the old law which would have limited the parties to a determination of what the situation was as of the date of acquisition.

Mr. Bergson: I think that may be so, your Honor.

The Court: Especially as it is a four-to-two decision, which is a very troublesome fact.

Mr. Bergson: I agree with that.

The Court: It was really a startling result because the [fol. 1459] Supreme Court judged the acquisition as of a date thirty-one years after the date of the acquisition, because the suit was brought thirty-one years after the acquisition and nobody else would have brought the suit because anyone else would have been barred by the statute of limitations long previously.

Mr. Bergson: That is quite right.

The Court: Well, I do not want to interrupt you too much. You may proceed.

Mr. Bergson: I do not mind, your Honor.

The Court: I thought it might be helpful to you if you knew how the Court's mind was working.

Mr. Bergson: Now, in addition, I think one of the things that the Court must look at in construing this acquisition is the congressional policies relating to industry in which the acquisition takes place. This, also, was referred to in the Cyrstal Sugar case where the sugar quota act was under consideration, and further than that, such a position is taken by the Attorney General's National Committee For Study under the Anti-Trust Laws.

The Court: You know, the Attorney-General's Committee's report is only a brief of counsel. It is not independent authority. I want to say quite frankly that is the reason [fol. 1460] I have not read it. Because the Attorney General naturally has to be partisan.

Mr. Bergson: This is partisan on the other side, so far as this case is concerned this would be an admission against interest.

The Court: I understand but you are not referring to that as an authority. You are referring to it as a concession, as an admission against interest.

Mr. Bergson: I can't even do that, your Honor, because I can't claim that the Attorney-General took full responsibility for the report of the committee.

The Court: Of course not.

Mr. Bergson: I do not want to place any undue stress on that. But I do think it is important that this committee that was assembled by the Attorney-General came out with this report and in studying the manner in which Section 7 cases have been treated and should be treated, made this statement.

Now, applying these tests to the case under consideration, what has been the power of the Association? The Government has contended throughout this case that it has been the intent of the Association to eliminate competition, to lessen competition, and to create a monopoly as a [fol. 1461] result of this acquisition.

What better test could there be of the impossibility of achievement of such an intent, if it existed, than the results that have been placed before your Honor?

As Dr. Nourse said in his testimony, it was a naive hope, it was not an economic probability.

Now, the Government has said that one of the proscribed effects of this acquisition has been that producers, independent producers—the definition of which I am not quite sure of from Mr. Saunders' argument because he talks about independent shippers shipping to Thompson's; he does not talk about shippers who came on the market through other associations than the defendant; they came on the market, nevertheless—as to producers, it seems to me that they are producers no matter where they went, and whether they shipped directly to a distributor or to a distributor through an association.

Now, I submit, your Honor, that there was not a single bit of evidence adduced in this case that one single pro-

ducer was actually excluded from or prevented from remaining in this market after the acquisition.

There is no evidence that even a single independent producer complained of injury or foreclosure by the acquisition. Not one independent producer was called as a witness by [fol. 1462] the Government.

Now, in this connection, your Honor, I would like to invite your attention to the fact that, while this case was in the course of preparation, the Government had FBI agents out all over the country-side interviewing producers. They were our producers, I will admit, but there is no reason why they could not have interviewed the so-called independent producers.

And, there is no evidence that the Association refused membership to even one producer.

Now, further than that, there was evidence which was uncontroverted, that the Association had and has from 1953 on, no exclusive dealing arrangements with any dealer in this market. So that these independent producers, if they had wanted to, could have gone to any one of these dealers and asked to be taken on.

Now, it seems to me, your Honor, that it is very important to consider the fact that there was no evidence of foreclosure of independent shippers introduced in this case because the Supreme Court in the Interstate Circuit case, which is 306 U.S. 208, held that the failure—this is an Anti-trust case—under such circumstances to call as witnesses those persons in the best position to know whether an anti-[fol. 1463] trust violation has occurred, is itself persuasive that their testimony, if given, would have been unfavorable to the Government.

And, as the Court went on to say, the production of no evidence by the Government when strong evidence is available, can lead only to the conclusion that the strong evidence would have been adverse. Silence, said the Court, then becomes evidence of a most convincing character.

Now, so much for exclusion at the producer level. How about competition among the dealers in the market? Except for Richfield-Wakefield Dairies which ceased to be competitive factors because of their failing financial condition, as of today there are the same number of dairies in the District of Columbia as there were at the time of the acquisition.

Embassy Dairy Division of the Association, while owned by the Association and while part of an integrated organization, is still a competitive factor in the market.

The testimony shows that competition has been keener since the acquisition of Embassy Dairy by the Association. The testimony shows that the Government has been paying lower prices for its milk since the acquisition of Embassy Dairy. The evidence shows that the independent dealers, those who buy milk from others than the Association, have increased their position in the market to a very marked de-
[fol. 1464] gree. High's Dairy, for example, has gone from a 1.3 per cent position in the market to a 7 per cent position, an increase in volume, your Honor, of 700 per cent.

The Court: We will let you continue after our usual recess.

(A brief recess was taken.)

The Court: You may proceed, Mr. Bergson.

Mr. Bergson: Your Honor, I think, as we recessed, I had just reached the point where I was arguing that the acquisition had had no adverse effect on independent dealers, and I had referred to High's and to Harvey's. And I think your Honor will recall that the evidence shows that this acquisition has had no adverse effect on the consuming public. There has been no increase in the Association's prices of Class I milk and there has been a decrease in the Association's price of Class II milk.

I think the evidence showed that to the extent that there had been an increase in price to the consumer, it was attributable to causes other than the price of milk, itself.

Going to Dr. Nourse's testimony, which I think is extremely cogent in this case, and taking his testimony as it related to the probable effects of this acquisition, at [fol. 1465] the time of the acquisition his testimony was, if your Honor will recall, that there was no probability even at the time of the acquisition that this acquisition would tend to substantially lessen competition or create a monopoly.

The Court: You know, Mr. Bergson, Dr. Nourse is one of the most eminent economists of our day in this country. There is no question about that. And anything he says is worthy of the greatest respect, but I daresay you can get a jury of 12 eminent economists and you would have a hung jury, because I know of no science more uncertain than economics or sociology.

Mr. Bergson: Well, your Honor, accepting that proposition, when I proffered two experts, your Honor stated that the Government could come forward with another economist if it desired, and it did not do so.

In so far as the du Pont case is concerned, while, as your Honor points out, it does not represent the majority view of the Supreme Court, I do think that the case looms large in this trial. And your Honor indicated in your questioning of me that perhaps the Government could have brought its case immediately after the acquisition or when it finally brought its case. I think I conceded that it could have done so. But, the Government can try a Section 7 case for a [fol. 1466] particular acquisition only once. This has nothing to do with the statute of limitations; this is res judicata. And, if the Government had brought the suit immediately after the acquisition, the Court would have been faced with the problem of reaching his decision on the basis of evidence available at that time. But the Government did not choose to bring the case then. The Government brought the case later. And this is an equity case and it seems to me that the Court must take into consideration not what might have happened immediately before and after the acquisition on the basis of hypothesis, but what actually has happened because that evidence is now available to the Court.

And, I do not think that the Court can dismiss what has happened in the intervening years as not being relevant because the Government could have brought the case when it did not bring the case.

Now, in addition to that, the du Pont case is vastly different from this case. In the du Pont case, the size of the market foreclosed, which was 50 per cent of the entire market for paints and fabrics, was considered by the Court to be so large that it was unnecessary to apply the qualitative test. But in this case, using the Government's theory, all that was foreclosed was 10 per cent of the market. And [fol. 1467] the evidence shows that the producers, the independent producers, could have gone to any other of the 90 per cent in the market.

Now I submit, in the light of the circumstances and the economic factors in this case, that quantitatively and quali-

tatively, both, but particularly qualitatively—which is the test that the Second Circuit used in the Crystal Sugar case, where the percentages were not so tremendous as they were in the du Pont case—that you must take into consideration the surrounding economic factors.

Further, your Honor, I think it is important to bear in mind—power to control is an important concept here, but in your Honor's earlier decision, your Honor held that it was all right for this Association to have 88 per cent of the market.

Now, how does this acquisition substantially enhance that power? I submit that it does not, and I submit that the events that have transpired in the last four years demonstrate that even if they wanted it to happen, they could not have made it happen. And that under those circumstances, your Honor, it leads me ineluctably to the conclusion—and I say this, of course, as an advocate, I admit, that this acquisition did not have the reasonable probability [fol. 1468] of a substantial lessening of competition or tendency of monopoly at the time of the acquisition, at any time since the acquisition or in the foreseeable future.

Now, Mr. Saunders has raised and paraded before your Honor an imaginary series of horribles. "Suppose this acquisition is approved and the Association then goes on and takes somebody else, and then they go on and take somebody else." Well, I say we meet those situations as we come to them. You do not convict someone of an offense when he has not committed it because he may commit it next week. And I submit that that argument has no basis in law, fact or logic and should be disregarded.

Now, I would like to address myself for just a moment to the Richfield-Wakefield acquisition and then come back to the Embassy acquisition, if I may. The evidence in so far as Richfield-Wakefield is concerned—

The Court: The Court has that in mind very well.

Mr. Bergson: —conclusively demonstrated that Richfield-Wakefield was a failing corporation. Under the law, the acquisition by a competitor of a failing corporation, as your Honor well knows, is not construed as the elimination of competition because the failure of the corporation is [fol. 1469] what would have eliminated the competition.

Now, going back to Embassy, as your Honor knows, in addition to our defense that this acquisition has not had the proscribed effects under Section 7, it is our further position that this was an acquisition consummated under the authority of the Secretary of Agriculture.

There is nothing in the statute, your Honor, that requires that there be prior authority. And I think that your Honor will probably take judicial notice of the fact that when an independent agency acts on an acquisition under the last paragraph of Section 7, that it is usually after the acquisition has been completed.

But, even if you don't, I submit to your Honor that that is the fact.

This acquisition was considered by that branch of the Department of Agriculture most concerned with the operation of dairy cooperatives. It was considered by the Solicitor of the Department of Agriculture, to whom the Secretary of Agriculture had delegated, under the so-called Schwellenbach rule, all of his authority in respect to the Capper-Volstead Act.

Now, I concede that there is no statutory provision which grants to the Secretary of Agriculture authority, per se, to approve this acquisition, but it is our position, your [fol. 1470] Honor, that there is no statute which gives the Secretary of Agriculture authority to approve any acquisition of any kind in any area. And I would be glad to hear if the Government knows of any such statute.

Now, that being the case, your Honor, unless Section 7's last paragraph was intended to cover this situation, the inclusion in a catch-all paragraph relating to six or seven agencies of the name of the Secretary of Agriculture would have indicated idle surplusage on the part of Congress and I think your Honor knows full well the statutory rule that words in the statute will be given meaning and that Congress is not to be deemed to have idly and uselessly included language in a statute.

It is therefore our second position in this case, your Honor, that irrespective of the consequences of the acquisition, so far as competition is concerned, the acquisition has had the authorization of the Secretary of Agriculture and it is hence exempt from the provisions of Section 7.

Your Honor, there is just one other point that I really do not want to argue to any extent because I do not want to trespass on your time.

The Court: That is all right.

Mr. Bergson: We have here an additional brief which [fol. 1471] has not yet been submitted to your Honor, and was not submitted to you earlier because it just was not ready.

The Court: I will be glad to have it.

Mr. Bergson: In which we take the position that as the evidence was developed in this case regarding the Section 7 violation, that it demonstrated that here was an acquisition by the Association not in combination or conspiracy with an outsider, and that, therefore, under any circumstances, as the facts have developed in this case, that the case that was just tried before your Honor—and I am not at all referring to the Section 1 and 3 counts—that the acquisition also should come within your Honor's prior ruling.

Now, I say this for two reasons, or two additional reasons: One is that this acquisition was charged as one of the means by which Section 2 was violated. Secondly, Judge McCulloch in the Dairymen's Cooperative case was also dealing—again I concede under Section 2—with acquisitions of dairies from outsiders and he held it was within the immunity provisions of the Capper-Volstead Act. I do not want to argue this belaboredly, your Honor, I just wanted to state our position and I would like to hand up this brief (handing to Court).

[fol. 1472] Thank you very much, your Honor.

The Court: Do you wish to say anything in reply?

Mr. Saunders: Unless your Honor would care to hear argument on this matter of the Secretary of Agriculture authorization, I do not, your Honor.

The Court: Very well, gentlemen; I am going to go over the briefs that you have submitted tonight. We will recess this trial until tomorrow and I hope, in fact, I expect to hand down my opinion tomorrow. But we will recess until tomorrow afternoon because I have other matters tomorrow morning so we will recess the trial until 1:45 p. m.

(At 3:35 p. m. the trial was recessed until 1:45 p. m., Friday, November 21, 1958.)

[fol. 1475]

IN THE UNITED STATES DISTRICT COURT

Transcript of Proceedings of November 21, 1958

PROCEEDINGS

The Deputy Clerk: United States versus Maryland and Virginia Milk Producers.

OPINION OF THE COURT—November 21, 1958

The Court: This is a civil action brought by the United States against the Maryland and Virginia Milk Producers Association, Incorporated, under the antitrust laws, for injunctive and similar relief.

While the complaint, which relates to the milk industry in the Washington Metropolitan area, is not technically divided into separate counts, it in effect sets forth three separate claims for relief or causes of action.

The first cause of action charges an attempt to monopolize interstate trade and commerce in supplying milk for resale as fluid milk in the Washington Metropolitan area, comprising the District of Columbia and nearby regions of Maryland and Virginia. This cause of action is based on Section 2 of the Sherman Act, 15 United States Code, Section 2.

The second cause of action charges a combination and conspiracy to eliminate and foreclose the competition abovementioned by making and carrying out a contract for the transfer to the defendant of substantially all of the assets of a concern known as Embassy Dairy, Incorporated, which is a retail outlet for milk in the area. This cause of action [fol. 1476] is predicated on Sections 1 and 3 of the Sherman Act, 15 United States Code, Sections 1 and 3.

The third cause of action, which has been the subject matter of the present section of the trial, charges that the defendant on July 26, 1954, acquired substantially all of the assets of Embassy Dairy, Incorporated, and that the effects of this acquisition have been or may be substantially to lessen competition or to tend to create a monopoly in the production and sale of milk to dealers in the Washington

Metropolitan area. This cause of action further charges that, with the same effect, the defendant on December 6, 1957, purchased and acquired all of the outstanding capital stock of Richfield Dairy Corporation and Simpson Brothers, Incorporated, which operated the Wakefield Dairy. This cause of action is founded on Section 7 of the Clayton Act, 15 United States Code, Section 18. The pertinent provision of that Section is found in Paragraph First, and reads as follows:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where, in any line of commerce, [fol. 1477] in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly."

The defendant is an agricultural cooperative association, having as members nearly two thousand milk producers, that is, persons operating dairy farms at which milk is produced.

As an affirmative defense the defendant pleaded that it is immune and exempt from prosecution under the antitrust laws under Section 6 of the Clayton Act, 15 United States Code 17, and Section 1 of the Capper-Volstead Act, 7 United States Code, Section 291.

The Court directed a separate trial of this affirmative defense.

The outcome of the separate trial was that the Court reached the conclusion that the defense of immunity was valid as to the first cause of action, on the ground that activities of agricultural cooperative associations are expressly exempted by statute from prosecution under the antitrust laws, either in criminal or civil proceedings.

The Court further held, however, that this immunity does not extend to contracts or combinations involving, in addition to agricultural cooperatives, any person or concern that is not an agricultural cooperative association and [fol. 1478] therefore not entitled to exemption.

On this basis, the Court held that the defense of immunity did not apply to the second and the third causes of action.

The Court further held that the Capper-Volstead Act did not exempt agricultural cooperative associations from the provisions of Section 7 of the Clayton Act, to which reference has been made.

After a short recess, the trial was then resumed as to the third cause of action, and has just been concluded.

The Court might observe at this juncture that, as a result of the efforts of counsel and the commendable cooperation between them, the various discovery weapons provided by the Federal Rules of Civil Procedure have been used in this litigation to the utmost extent. Requests for admissions numbering 1624 were submitted by the plaintiff and 211 such requests were submitted by the defendant. The great majority of these requests resulted in admissions. Interrogatories were used to a considerable extent and stipulations were made as to authenticity of documents. In addition, numerous stipulations of facts were entered into, some at a series of pretrial hearings and others outside of the courtroom.

The result of this enlightened course of procedure has been that the factual disputes have been reduced to a mini- [fol. 1479] mum and the amount of evidence to be introduced at the trial has been greatly reduced in volume, thereby shortening the trial by a considerable extent.

The issues arising out of the third cause of action are now before the Court for decision.

Section 7 of the Clayton Act, which has been heretofore quoted, as originally enacted was limited to acquisitions of capital stock. By an amendment enacted on December 29, 1950, the Act was extended so as to cover acquisition of assets as well. In addition, the amendment generally broadened the phraseology of the statute. In 1950 it became sufficiently comprehensive and inclusive in its terms so as to bring under its ban both horizontal and vertical acquisitions, either of capital stock or of assets of other concerns.

In this connection it might be said that by a "horizontal acquisition" is meant the acquisition or control of one competitor by another; while the word "vertical" is applied to an acquisition or control by a concern in one echelon of a concern in another echelon in the same line of trade or

commerce, such as a transaction between a manufacturer and a jobber or between a wholesaler and a retailer or between a manufacturer or dealer and a customer.

The statute was construed recently by the Supreme Court in United States versus E. I. duPont de Nemours & Com- [fol. 1480] pany, 353 United States 586. The facts of that case were unique. In 1917 duPont & Company acquired a considerable block of stock of General Motors Corporation. Obviously, the two corporations were not competitors and were not engaged in the same line of business. DuPont and Company, however, were selling certain commodities, such as fabrics, that were used in the manufacture of automobiles. Among the customers for these products was General Motors Corporation. The latter purchased some of these products from duPont and some from other manufacturers and dealers.

In 1949 the government brought a civil suit attacking the stock acquisition on the ground that it violated Section 7 of the Clayton Act in that it tended to lessen competition between duPont and other dealers in similar products, all of whom were selling or endeavoring to sell their goods to General Motors Corporation.

The Court held that the transaction violated Section 7 of the Clayton Act.

In discussing the construction to be accorded to the statute, the Court held that it was immaterial whether actual restraints or monopolies in fact resulted from a merger or an absorption condemned by the Clayton Act or in fact whether there was actually a substantial lessening of competition.

The Court went even further and held that it was im- [fol. 1481] material whether a substantial lessening of competition was intended.

The test formulated by the Supreme Court in the duPont Case was whether there was a reasonable probability that a substantial lessening of competition or a monopoly might result from the acquisition by one corporation of the capital stock or the assets of another corporation.

On this point the Court said, at page 589:

"The Section is violated whether or not actual restraints or monopolies or the substantial lessening of competition have occurred or are intended."

In order to be within the ban of the statute, it is, of course, necessary that there be reasonable probability of a lessening of competition or the creation of a monopoly within an area of effective competition. The market affected must be substantial and it must appear that competition may be foreclosed in a substantial share of that market.

The Court expressly held that the Act applies both to horizontal and to vertical acquisitions.

So, too, the Court also indicated that the fact that all concerned acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company; and without any design to overreach anyone, [fol. 1482] does not defeat the right of the government to relief.

Finally, the Court held, for the purposes of the case before it, that the test was whether at the time of the institution of the suit, and not necessarily at the time of the acquisition of the capital stock or assets, there was reasonable probability that the transaction was likely to result in the condemned restraints.

It must be observed that the duPont case was decided by a vote of four to two, with three members of the Court abstaining from participation. A query therefore arises whether this decision should be regarded only as *res judicata* as between the parties to it or whether it sets forth binding principles as well on the basis of *stare decisis*. We do not have the views of any five members of the Court on the questions decided in the duPont Case.

The biggest bone of contention in that case, however, was whether the legality of the acquisition challenged by the government may be judged by the situation existing as of the time of the institution of the suit instead of as of the date of the transaction. In the duPont Case suit was instituted over thirty years subsequent to the transaction assailed by the government. In this respect the case, if it should become a binding precedent, introduces a far-reaching innovation and a novel doctrine into the law, since [fol. 1483] ordinarily the validity of a person's acts or transactions is determined as of the date when they are performed or consummated and when the cause of action

arises, rather than as of some later time fortuitously or arbitrarily selected by the institution of suit.

Fortunately, this is a question that does not concern us in the instant case since here the government contends that the challenged transaction was illegal as of its date, as well as of a subsequent time, and the Court is called upon to determine the issues as of the date of the original transaction and, of course, in the light of subsequent events.

Moreover, unlike suit in the duPont Case, in this instance the action was brought within a reasonable time after the challenged transaction. The challenged transaction took place on July 26, 1954, and the original complaint in this case was filed on November 21, 1956.

Going on to the facts that must govern the disposition of this controversy, the case relates to the Washington Metropolitan area, as has been stated, which consists of the District of Columbia and nearby Maryland and Virginia. This area constitutes a separate market for the retail distribution of milk.

The defendant, Maryland and Virginia Milk Producers Association, Incorporated, is a Maryland corporation, hav- [fol. 1484] ing its principal office in the District of Columbia. As has been stated, it is an agricultural cooperative association, having as members nearly two thousand dairy farmers, most of whom are located in Maryland and Virginia. The milk is delivered by the members to the defendant, which acts as the marketing agency for them. Most of the milk is sold eventually to dealers in the Washington Metropolitan area.

The defendant also owns a plant at which it transforms surplus milk into various milk products, such as ice cream and powdered milk.

The net worth of the defendant corporation is approximately five million dollars.

For the purpose of determining the price to be charged to customers and the price to be paid by the Association to its members, the milk is divided into three categories. So much as is resold to the ultimate consumers in liquid form is placed in Class I; so much as is converted into cream or cottage cheese forms Class II; and the balance, known as surplus milk, which is transformed into other by-products,

such as ice cream and powdered milk, is denominated Class III.

The commodity in Class I and Class II is known in the trade as fluid milk.

Different prices are charged to the customer for milk in each of the three groups, Class I receiving the highest [fol. 1485] and Class III receiving the lowest price.

Since all milk delivered to the Association by its members forms a single pool, figuratively speaking, out of which all sales are made, it is impossible to allocate specific quantities to each of the three classes out of each member's contribution. Accordingly, a so-called blend price is ascertained on the basis of the proportions of total sales made by the Association in each class out of the aggregate amount sold during a specified period. The Association then pays its members on the basis of the blend price, after deducting a percentage, of course, for its maintenance and operating expenses.

Manifestly, the more milk that can be sold in Class I and the less in Class III, the greater will be the blend price and the more profitable the returns to the members.

A considerable quantity of milk supplied by defendant to its customer dealers was resold to the government for use by personnel at government establishments within the Washington Metropolitan area, such as military and naval stations, government hospitals, and other institutions. These sales were made by contracts based on competitive bidding. This aspect of the industry, though minor in proportion, was nevertheless of some importance, as government purchases in the market amounted to about two million dollars a year.

[fol. 1486] In the Washington Metropolitan area approximately 86 per cent of all sales of fluid milk to dealers were made by the defendant, and about 45 per cent of sales to federal establishments were made by dealers who procured their supply from the defendant.

There were about a dozen dealers, or dairies as they are sometimes called, in the area. All but four purchased the bulk of their supply of fluid milk from the defendant. Among them were the three largest dairies. Embassy Dairy, Incorporated, the fourth largest, was an independent

concern and did not buy from the defendant but procured its supply directly from farmers who, in turn, did not sell to the defendant.

Wakefield Dairy, a smaller establishment, followed the same course as Embassy.

Embassy sold to federal installations over 47 per cent of all government purchases as against about 45 per cent supplied by dealers who, in turn, purchased from the defendant.

Embassy obtained such a large share of the government business by cutting prices and frequently submitting bids lower than those of defendant's dealer customers.

Embassy bought its milk from about 122 independent dairy farmers, as against the almost 2000 farmers who were members of the defendant Association.

The purchases of Embassy for resale as fluid milk [fol. 1487] amounted to about 9.5 per cent of the milk supply reaching the Washington Metropolitan area.

In the spring of 1954 negotiations were initiated between the defendant and Embassy Dairy, Incorporated, for the acquisition of all of the assets of Embassy Dairy by the defendant Association.

While the government is not required to establish the defendant's motive or intent in entering into this transaction, nevertheless evidence of motive or intent is admissible as it may possibly cast an illuminating light on what actually transpired.

Chief Justice Hughes said, in Texas & N. O. Railroad Company versus Railway Clerks, 281 United States 539-548, that:

"Motive is a persuasive interpreter of equivocal conduct."

In memoranda not intended for public consumption but evidently prepared for private circulation among the directors and members of the Association, as well as for submission to a financial institution from which it was desired to borrow money needed to consummate the transaction, the defendant's General Manager frankly, candidly, and without guile or equivocation and without attempt at euphemism, set forth the aims of those who were guiding the destinies of the Association.

In a memorandum dated May 9, 1954, which was intro-
[fol. 1488] duced in evidence as Plaintiff's Exhibit 22, he said:

"As of April 1, 1954, 1926 farmers were members of the Association. These 1926 farmers were shipping approximately 208,000 gallons of milk daily, which is better than 90 per cent of the entire Metropolitan Washington milk supply. The average farmer markets in excess of 100 gallons of milk daily."

Again he said, in the same memorandum:

"The Association's customers are the large retail dairies in the Washington Metropolitan area. However, from time to time it happens that these dairies do not absorb the entire amount of milk delivered by the members. In this event the Association undertakes to sell this excess in other markets. This excess is a normal incident to the operation of the cooperative, the reason being that in order to be sure of an adequate supply it must maintain an excess over and above past average requirements."

Further, he stated:

"We believe that the net return to the members is superior to that in any other market, costs of production being taken into consideration."

[fol. 1489] In the same memorandum he said:

"The benefits expected from the acquisition of Embassy Dairy are as follows:

"1. Elimination of bootlegging, i.e., bringing in cheap uninspected 'distress' milk from other markets.

"2. The elimination of this 'bootleg' milk will allow our own milk to replace it, to the great increase of the blend price."

I will skip Number 3 as immaterial.

"4. Increase in members estimated at 60 to 70 new producers (now selling to Embassy).

"Embassy Dairy does between eight and nine million dollars annual business, which business the Association

will get and in large part retain. Assuming, however, it loses some of this business, it will lose it to other local dairies who buy from the Association and so the Association would retain the sale of this milk."

And finally this memorandum makes the following significant statement:

"The purchase of Embassy Dairy will eliminate a disturbing influence which has been a thorn in the side of the Association for many years, which the local health [fol. 1490] authorities apparently have been unable to control. Acquisition of Embassy Dairy cannot be other than helpful and profitable to the Association."

A memorandum dated June 2, 1954, also prepared by the General Manager of the defendant, which has been introduced in evidence as Plaintiff's Exhibit 21, contained somewhat similar statements. The pertinent portions read as follows:

"The Embassy Dairy has for the past 15 years been the major factor involved in the attempts to weaken and destroy the Milk Act of 1925."

After making some statements that are here immaterial, the writer goes on as follows:

"In addition to being the leader in the attempts to circumvent and modify the Milk Act and the accompanying regulations, the dairy, through its ability to buy cheap milk both from unlicensed sources and from independent Washington producers, has cut into the market structure to the extent that they have taken considerable sales away from dealers buying milk through the Association.

"As the result of their ability to under-buy the market and thus take away business from dealers purchasing [fol. 1491] their milk through the Association they have, as a result, reduced the Association's Class I sales and therefore caused additional surplus to the members of this Association. We estimate that this has amounted to about $700,000 a year loss in revenue to Association producers.

"The effect upon the producer milk checks has not been limited to this loss of sales, but extends to even a greater amount to the contract milk bidding. There is approximately 14,000 gallons of contract milk a day in this Metropolitan market. This milk would normally be classified as Class I and be sold to the distributors at the Class I price. As the result of the dairy's ability to under-buy, therefore under-cut in their bidding, it has been necessary for the Association to drop the contract price to a competitive level, that is, to the price that Embassy is able to buy their milk."

And again the writer says:

"By acquiring this dairy the Association can immediately pick up approximately 8,000 gallons of milk sales for its members for which the dairy has been buying [fol. 1492] the milk from other than licensed producers on the market."

About six months after the transaction was consummated the Secretary-Treasurer of the Association expressed similar sentiments in a letter that he wrote to an officer of a similar association in Detroit, Michigan. This letter, dated February 8, 1955, which was introduced in evidence as Plaintiff's Exhibit 48, contains the following statement:

"The first plant we 'inherited' in 1940 was a small one that we had to take over as the result of bankruptcy. The second one which we have just taken over as of August 1, 1954, was one that we felt we had to buy for self protection; the former owners of which had repeated their activities once executed in the Chicago market and since 1930 in the Washington market to the extent that from our standpoint everyone in the distributing field would be happy to have them out of the market. It did give us an additional outlet for a sizable amount of milk which we did not have under prior conditions inasmuch as they were buying independent milk."

The negotiations between the defendant and Embassy Dairy, Incorporated, culminated on July 26, 1954, by a [fol. 1493] conveyance of the assets of Embassy to the

Association, including all of its tangible property, both real and personal, as well as intangible assets. The Embassy Dairy then immediately went out of business.

The evidence indicates that the price paid by the Association for the transfer was far in excess of the actual and intrinsic value of the property purchased.

To be sure, the rosy prospects previously depicted did not materialize and the optimistic expectations of those in control of the Association were not fully realized. Nevertheless, they were at least partially attained.

Apparently the continued existence of several comparatively small dairies kept alive considerable competition in the industry.

After the absorption of Embassy by the defendant, the latter undertook the retail business previously conducted by Embassy, in addition to continuing the functions of the Association as a wholesaler.

Many of the independent producers who supplied Embassy were unable to find an outlet for their product in the Washington market unless they were willing to surrender their independent status and join the Association. Some of them, indeed, pursued the latter course, thereby augmenting the defendant's membership. A large proportion of them, however, began to ship to a Baltimore [fol. 1494] dealer.

Thus, one result of the transaction was that a portion of the fluid milk supply was diverted from the Washington to the Baltimore market, while another consequence was an increase in the amount of milk coming to the defendant's hands.

A still further sequel of the transaction was the elimination of the largest single outlet in the Washington Metropolitan area for milk produced by independent dealers. Immediately after the Embassy acquisition 91.7 per cent of the milk purchased by the federal government originated directly or indirectly from the defendant, as against 45 per cent that it had indirectly supplied previously. The Embassy Dairy was eliminated completely as a factor from this competitive business.

Thus, the result of the acquisition of Embassy by defendant tended to lessen competition in the milk industry

in the Washington market in more ways than one. It diminished competition for the purchase of milk from producers by eliminating one large independent purchaser; it reduced competition for sales to government establishments by excluding a rival that had been in the habit of cutting prices and under-bidding Association members; it tended to create a monopoly by concentrating a larger [fol. 1495] proportion of the milk supply reaching the Washington area in the hands of the defendant, thereby augmenting the defendant's control or, at least, influence on the market.

It must, indeed, be observed that defendant did not achieve complete monopoly, for several comparatively small independent dealers still stayed in the market and even prospered. The law, however, is not aimed only at complete monopolies or directed solely at entire elimination of all competition. It is sufficient if the acquisition, merger, or absorption tends to lessen competition or tends to create a monopoly.

The conclusion is inescapable that the transaction challenged by the government in respect to the Embassy Dairy led to each of these consequences.

Without doubt, the result was that the defendant enhanced its dominating position in the market, even though it did not attain complete control.

It is argued by able counsel for the defendant that the acquisition of Embassy by the defendant did not reduce the number of dealers in the market but merely resulted in the substitution of another dealer for the one who had been eliminated, in that the business previously conducted by Embassy was taken over and continued to be operated by the defendant, in addition to the defendant's business as a wholesale distributor.

[fol. 1496] Ingenious as this line of reasoning is, it does not solve the problem. The transaction constituted much more than the replacement of one dealer by another. It was the absorption of the business of the largest independent dealer by the biggest wholesaler in the area and combining the affairs of the two concerns into a single operation, thereby augmenting the influence of the latter in the market and getting rid of a troublesome rival.

So, too, it is no answer to say that milk prices in the area did not climb to a higher level subsequent to the transaction. Prices are affected and influenced by numerous imponderable factors. It is within the realm of possibility that prices might have fallen were it not for the acquisition of Embassy by the Association. The subject of price fluctuations is a topic concerning which the Court cannot speculate.

As an affirmative defense the defendant invokes the last paragraph of Section 7 of the Clayton Act, which reads as follows:

"Nothing contained in this Section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Com- [fol. 1497] merce Commission, Securities and Exchange Commission, in the exercise of its jurisdiction under Section 79 of this Title, the United States Maritime Commission or the Secretary of Agriculture, under any statutory provision vesting such power in such Commission, Secretary, or Board."

Stripping this provision of those portions that are not material to the issues in the case at bar, the pertinent language is reduced to the following:

"Nothing contained in this Section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Agriculture under any statutory provision vesting such power in such Secretary."

In support of this defense, defendant introduced evidence to the effect that it applied to a government financial institution known as the Baltimore Bank for Cooperatives for a loan to enable it to carry out the purchase of the Embassy assets and that after scrutinizing the merits of the proposed transaction the Bank made the loan requested by the defendant.

The defendant further introduced evidence to the effect that the Marketing Division of the Farmer Cooperative Service of the Department of Agriculture looked into the

desirability of the transaction and expressed a favorable opinion.

[fol. 1498] This evidence does not sustain the defense. For two reasons:

First, the statute above quoted exempts only such transactions as are consummated pursuant to authority given by the Secretary of Agriculture "under any statutory provision vesting such power in such Secretary." Admittedly, however, there is no statutory provision empowering the Secretary of Agriculture to approve any transaction such as is involved here.

Second, the transaction was not authorized either by the Secretary of Agriculture or by anyone acting in his behalf.

The acts and statements of government officials on which the defendant relies are not sufficient to constitute statutory sanction. Even if they should be deemed to be such representations as might form a basis for an estoppel as between private individuals, this circumstance cannot aid the defendant. It is elementary law that the government cannot be estopped by statements or acts of any of its officers or agents.

Authorities supporting this principle and applying it are legion. Suffice it to cite two old decisions of the Supreme Court from which the later authorities are derived and on which they are based: The Floyd Acceptances, 7 Wallace 666, 676, and Wisconsin Central Railroad Com-

[fol. 1499] pany versus United States, 164 U. S. 190, 210.

The Court, therefore, concludes that the acquisition of the assets of Embassy Dairy, Incorporated, by the defendant constituted a violation of Section 7 of the Clayton Act and that, consequently, judgment should be rendered compelling the defendant to divest itself of these assets and cancelling all contracts ancillary to the transaction.

A different problem arises in connection with the acquisition of the capital stock of the Richfield-Wakefield Dairies. There are two corporations involved, one known as Richfield, the other one Wakefield.

At the time in question, the Richfield Corporation was out of business, but owned and controlled the stock of

Wakefield Corporation, or, rather, Simpson Brothers, Incorporated, which operated the Wakefield Dairy.

The evidence establishes without contradiction that at the time the capital stock of these two corporations was purchased by the defendant the two companies were hopelessly insolvent and were deeply in debt. The defendant was a very large creditor, for an amount exceeding $300,000 for unpaid milk bills. The Wakefield Dairy was on the brink of bankruptcy.

The acquisition of capital stock or assets of a failing corporation is not within the ban of Section 7 of the Clayton Act. While the statute does not expressly so [fol. 1500] provide, this conclusion is inherent in the statutory provision because the acquisition of a failing corporation that is on the brink of going out of business cannot result in lessening competition or in creating a monopoly.

Be that as it may, the Supreme Court so held in International Shoe Company versus Federal Trade Commission, 280 U. S. 234, 298.

The Court concludes, therefore, that the acquisition of the capital stock of the Richfield Dairy Company and Simpson Brothers, Incorporated, was not violative of Section 7 of the Clayton Act.

This opinion will constitute the findings of fact and conclusions of law.

Judgment will be rendered adjudging the acquisition by the defendant of the capital stock of Richfield Dairy Company and Simpson Brothers, Incorporated, to be valid, and further adjudging the acquisition by the defendant of the assets of Embassy Dairy, Incorporated, and the contracts ancillary thereto to be invalid as in violation of Section 7 of the Clayton Act.

The judgment will require the defendant to divest itself within a reasonable time of all assets acquired from Embassy Dairy, Incorporated, and will direct the cancellation of all contracts ancillary to the acquisition.

[fol. 1501] The judgment will further direct the defendant to file a report within sixty days and at such other times as the Court may order, setting forth what steps are being taken to carry out this judgment.

The judgment will also provide that applications may be made at the foot of the decree.

Counsel will submit a proposed judgment.

After our usual recess, the Court will take up the question of further proceedings.

(Brief recess.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Gentlemen, it seems to the Court that since the second and third causes of action ask for the same relief, that the second cause of action has now become moot and need not be tried.

I will ask government counsel to state whether that is in accord with their views.

Mr. Saunders: Government counsel agrees with the Court that the relief sought under both of those causes of action seems to be that which the Court has ordered be granted.

I might say, however, your Honor, that in the recess I have contacted my superiors at the Department of Justice. Of course, they would like an opportunity to study the effect of the ruling. And in the recess I have also talked with Messrs. Bergson and Hughes and I have indicated [fol. 1502] to them—and they are perfectly willing to have it done this way—that I would like to have an opportunity to consult, and, then, at a date to be mutually agreed upon, counsel come back before your Honor and indicate where the matter seems to stand and what the views of the respective parties are.

The Court: I think that is very reasonable. We do not have to reach a finality at this moment.

It does seem to me, however, that so far as this Court is concerned, no further trial is needed. But I think counsel should have an opportunity to reflect on the matter.

Mr. Saunders: I will advise the officials of the Department of your Honor's views.

The Court: And you gentlemen can agree upon a date and get in touch with the Clerk, who will set the matter for a hearing.

I presume government counsel will draw a proposed judgment and serve it on the other side and submit it to the Clerk, and if there are any objections we will have a hearing on it.

Mr. Saunders: Very well, your Honor.

Thank you, your Honor.

The Court: I presume there is nothing further so far as this case is concerned.

Mr. Bergson: Nothing from the defendant.

[fol. 1503] The Court: I want to say this, gentlemen, that I have been highly gratified, as I indicated before, with the high professional level on which this case was tried on both sides and I want to compliment both counsel and their associates for handling this matter in the best traditions of the legal profession.

Mr. Bergson: Thank you, your Honor.

(Thereupon, at 3:15 p.m., trial in the above-captioned cause was concluded.)

[fol. 1503a]

OFFICIAL TRANSCRIPT OF PROCEEDINGS—December 15, 1958

[fol. 1504] APPEARANCES:

On behalf of the Government: Joseph J. Saunders, Esq., Edna Lingreen, Esq., Joseph E. Waters, Esq., A. Duncan Whitaker, Esq.

On behalf of the Defendant: Herbert A. Bergson, Esq., William J. Hughes, Jr., Esq., Daniel H. Margolis, Esq., Daniel J. Freed, Esq.

[fol. 1505] PROCEEDINGS

The Deputy Clerk: United States versus Maryland and Virginia Milk Producers.

COLLOQUY BETWEEN COURT AND COUNSEL RE MOOTNESS AND ENTRY OF JUDGMENT

The Court: Mr. Saunders.

Mr. Saunders: Thank you, your Honor.

Your Honor will recall that at the conclusion of the trial of the cause of action in the case of the Maryland and Virginia Milk Producers Association, your Honor having ruled in favor of the government on the Section 7 cause, asked government counsel whether or not in view of the

ruling on the Section 7 cause of action and the relief which your Honor indicated would be given, the cause of action under the Sherman Act, your Honor will recall under Sections 1 and 3, had not become moot and need not be tried.

At that time I requested your Honor to permit me to have an opportunity to take up this matter with my superiors.

I have done that, your Honor.

I am back here this afternoon to state to the Court that the government does not believe that the Sherman Act cause of action is in fact moot.

The defendant has publicly stated that it will appeal your Honor's ruling under Section 7.

The Court: I do not take cognizance of public statements not made in court.

[fol. 1506] Mr. Saunders: I say that simply as a preface to the reasoning—or, I think I should express the government's view as to this matter.

Until, of course, the government is assured of the relief under Section 7 to which it believes it is entitled, we cannot concede that the Sherman Act cause of action is moot.

In effect, therefore, your Honor, I am back here to state to the Court that the government does not believe that the Sherman Act cause of action is moot and the government—

The Court: Why is it not moot, if it asks for the same relief as the cause of action on which you prevailed?

Mr. Saunders: Well, your Honor, in the first place—

The Court: Suppose, for example—if I may interrupt you again—suppose, for example, there is an action, a cause of action for damages in tort and there are two counts, one for nuisance and one for negligence. And suppose it is a non-jury trial. We have many non-jury trials in tort cases, especially in actions against the government. And suppose the Court separates the two causes of action as a matter of convenience and tries, say, negligence, and holds for the plaintiff. I do not think the plaintiff is entitled to go on and try the cause of action for nuisance.

Now, that is an illustration of the sort of thing that sometimes happens. That sort of thing happens in patent [fol. 1507] cases, for instance.

Is it not likely to be, if I may use a rather literary expression, love's labor lost to try this cause of action?

Mr. Saunders: Well, your Honor, in connection with that, and your Honor's question requires me to move along a step, of course that does raise a question of what is the alternative. And, of course, we realize that the Court would not want to take up an unnecessary burden if it is unnecessary. As I say, the government—

The Court: It is not that the Court does not want to take an unnecessary burden. I want to make it quite clear that there is no burden on the Court because if I am not trying this case I am trying some other case. It is not like country courts where the judge, if he is not trying a case at all, can go off fishing somewhere. We are sitting continuously. So, if it is not one case, it is another. But it is a question of the interests of other litigants who are waiting to get their cases tried. The more time that is devoted to one case the longer other litigants have to wait.

Mr. Saunders: Well, I guess it comes down to this, your Honor, that the government feels that it is entitled to have a ruling on the Sherman Act cause of action. And in connection with that we have in mind the consideration that your Honor just advanced, and it is for that reason [fol. 1508] that I come here to inform the Court of the government's position and to see what methods are available by which we can achieve that result.

The Court: I would be very glad to hear you on that.

Mr. Saunders: Well, just as a suggestion, your Honor, but one that the government has considered, I venture to suggest this: The government feels that because the Sherman Act cause of action treats of basically the same factual matter, namely, the acquisition of Embassy Dairy, but where it is alleged that the contract itself and the agreement between Embassy and certain parties, including the seller of Embassy, violated the Sherman Act, that to a very large extent the evidence which would be adduced at the Sherman Act cause of action is already in the record.

We have considered this possibility and think that it is worthy of some merit and some discussion, namely, that the case be submitted to the Court for a ruling on the basis of the record of the Section 7 trial.

The Court: Well, I would be willing to do that.

Mr. Saunders: Of course, I have not discussed this with opposing counsel, your Honor.

The Court: I understand.

Mr. Saunders: Because that is—

The Court: In other words, I would be willing to have [fol. 1509] the case submitted on the record as it stands, and of course I will give an opportunity for oral argument as to the second cause of action.

Mr. Bergson: Are you asking me, your Honor?

The Court: Yes, I would like to hear from defense counsel.

Had you concluded your remarks?

Mr. Saunders: Yes, your Honor.

Mr. Bergson: Your Honor, may I have just a minute to confer with my co-counsel on this?

The Court: Yes, indeed. Take whatever time you need, Mr. Bergson.

(Brief pause.)

Mr. Bergson: That would be agreeable to us, your Honor, on reasonable notice as to when the argument would be had.

The Court: Of course. Then I shall do that. I shall be glad to rule on the second cause of action with the understanding that it be submitted on the same record with an opportunity to counsel for oral argument. I think that we ought not to have the oral argument until after the first of the year. That will give both counsel an opportunity to prepare. What date does either one of you suggest? I would be glad to hear from either or both of you as to a possible date.

(Brief pause.)

[fol. 1510] Mr. Saunders: Your Honor, any time during the week of January 12th.

The Court: What do you say as to that?

Mr. Bergson: That is agreeable, your Honor.

The Court: I will set this for Monday, January 12th. I will be very glad to give you full opportunity for a full argument.

Mr. Bergson: And if we desire to submit briefs would your Honor receive briefs?

The Court: Yes, I will be very glad to have briefs, provided they are submitted either prior to or at the time of the argument.

Mr. Bergson: Yes. Of course.

The Court: I dislike the practice of giving time for submission of briefs after the argument because that is burdensome for the Judge, a very heavy burden, because the Judge's recollection is apt to fade on some of the things in view of the fact that other matters come before the Judge in the interim. But I will be very glad to have any memoranda or briefs counsel care to submit either prior to or at the time of the oral argument.

Mr. Saunders: Thank you, your Honor.

Mr. Bergson: There is one other open matter, your Honor. That is the question of the judgment on the count [fol. 1511] that you have already decided. It seems to me that that might be disposed of.

The Court: It is immaterial to the Court. Counsel may submit a separate judgment or, if they wish, they can wait until both causes of action are disposed of.

Is there any preference so far as counsel are concerned?

Mr. Bergson: So far as we are concerned, we would like to have the judgment entered on the second cause of action, the cause of action that has already been tried, whenever your Honor is prepared to hear us.

We have a judgment prepared, the government has submitted a judgment to us, and we have not agreed on a judgment, your Honor, and I doubt that we ever will, so that the matter is going to have to be taken up before your Honor at some time.

Mr. Saunders: The government would prefer, your Honor, to have one judgment entered if it is possible to have that done, covering the remaining causes of action. That would, of course, mean that we would prefer to have the matter continued in abeyance until after the January date which has been set.

The Court: I can see some advantage in that, unless there is some particular reason that does not occur to me, Mr. Bergson, why a separate judgment—

Mr. Bergson: It just seemed to me that it was more [fol. 1512] orderly procedure. We tried Count 1, we entered a judgment on Count 1; we have tried Count 3, it seems to me that we should enter a judgment on—

The Court: I will tell you what I have in mind. If the government prevails on Count 2, there should be only one appeal, and I think it would be better if there were one judgment. On the other hand, if the defendant prevails on Count 2, there would be a judgment dismissing Count 2 and granting the relief prayed for in Count 3, and if the defendant appeals the government might want to cross appeal.

Unless a month's delay is prejudicial—and if it is I will enter judgment right away—it seems to me that it would be helpful to have only one judgment.

Mr. Bergson: I can't candidly state to your Honor that it would be prejudicial to have the delay.

The Court: I think it would be simpler.

Of course, if both of you joined in wanting a separate judgment, naturally I would not refuse to do so, but in my view it is better to have one judgment.

The reason I signed a separate judgment in the other count was because counsel pressed for a separate judgment and wanted a separate judgment. I think you wanted a separate judgment.

Mr. Bergson: And I do again.

[fol. 1513] The Court: Yes, but there you prevailed. Counsel for the prevailing party has a right to have a judgment immediately. And if the government wanted a judgment now and you did not, I say the government would be entitled to have judgment entered now. But the government would rather wait and you do not contend that there is any prejudice and I think the better practice is to have one judgment.

Mr. Bergson: We like to consider, your Honor, that we did a little prevailing under Count 7.

The Court: I understand.

Then we will withhold the entry of final judgment until after the disposition of the second cause of action. And I am not going to delay long. I think you gentlemen are well aware that that is not my practice.

Mr. Hughes: If your Honor please, I would like to make clear to your Honor that in having our hearing before you on January 12th, of course we do not by any means concede that the case is not moot, that second cause of action. We may want to argue that.

The Court: I think perhaps the word "moot" is not a suitable word. What I meant by "moot" is really—and I think I was guilty of an inaccurate use of the word—is that it is unnecessary to decide the issues, rather than that the case is moot. Just as to use my illustration, if [fol. 1514] there are two counts in a tort action, nuisance and negligence, and the plaintiff prevails on one, the other one is not strictly speaking moot, but it is not necessary to decide it, although there are instances where decisions such as that are made. I tried a patent infringement suit in the Southern District of California in September and there were two defenses, the usual defenses in a patent case, one was that the patent was invalid and the other was that it was not infringed. I held that the patent was invalid, and I could have stopped there, but I also decided as to the issue of infringement and held that the patent was not infringed, on the theory that if the matter went to the Court of Appeals and the Court of Appeals should hold that the patent was valid, it would not be necessary to send it back for a new trial to determine the issue of infringement.

Now, counsel for one of the parties were surprised that I went that far, and I explained the reason, and they both agreed that it was better for both parties to have both issues disposed of.

So, I can see the advantage of having a ruling in this case on both the second and third causes of action, because suppose the Court of Appeals says, "This is not a violation of the Clayton Act; let's send it back for a trial on the Sherman Act issue." Well, you do not want to go through that.

Thank you, gentlemen.

[fol. 1515] Mr. Saunders: Thank you, Your Honor.

Mr. Bergson: Thank you, Your Honor.

(Thereupon, at 2:15 p.m. the above-captioned hearing was concluded.)

[fol. 1534]

Official Transcript of Proceedings of January 14, 1959

* * * * * * *

[fol. 1588] THE COURT'S RULING—January 14, 1959

The Court: As has been heretofore indicated, the complaint in this civil action brought by the United States against the Maryland and Virginia Milk Producers Association, Inc., under the anti-trust laws, is in effect divided into three separate claims for relief or causes of action.

At the first section of the trial, the Court upheld the defense of immunity to the first cause of action, in that the Defendant, being an agricultural cooperative, was immune from the anti-trust laws unless and except when it entered into transactions with persons or organizations that [fol. 1589] themselves did not possess such immunity, that is, were not agricultural cooperatives.

The trial then proceeded as to the third cause of action, which was predicated on the Clayton Act. That section of the trial concluded with a decision in favor of the Government to the effect that the transaction involving the acquisition by the Defendant of Embassy Dairy, Inc. was a violation of Section 7 of the Clayton Act, and with a decision in favor of the Defendant in respect to similar acquisition of Richfield and Wakefield Dairies.

The Government then requested that the Court proceed to a decision under the second cause of action, which also attacked the Embassy Dairy transaction, but based the attack on the Sherman Act, instead of on the Clayton Act.

It was stipulated that the case, in so far as this cause of action was concerned, would be submitted on the same record as that before the Court at the trial on the first and third causes of action.

The Court, therefore, readopts the findings of fact that it has heretofore made.

In addition to that, it is going to make a few additional findings, largely of the nature of ultimate findings based upon the evidentiary findings heretofore made.

First, the Court finds as a fact that the result of the transaction complained of was a foreclosure of competition,

[fol. 1590] in respect to Government contracts and in respect to purchases of milk from milk producers.

The Court further finds as a fact that the transaction complained of was entered into with the intent and purpose of restraining trade.

In the light of the decision of the Supreme Court in United States v. Griffith, 334 U. S. 100, 105, the Court does not regard it as necessary to find a specific intent to restrain trade in order to reach the conclusion of law that the anti-trust laws have been violated. Nevertheless, the Court does make hereby such a finding of fact.

The Court further concludes that an unreasonable restraint of trade, violative of the Sherman Act, has resulted from the acquisition of Embassy Dairy by the Defendant.

It has been urged in behalf of the Defendant that the transaction involved in this case is within the immunity accorded to agricultural cooperatives. The basis of this argument is that the doctrine which bans immunity in respect to transactions entered into between agricultural cooperatives and organizations that are not such cooperatives should be limited to such transactions as result in a competitive advantage to the other party to the transaction, that is, the party which is not clothed with the immunity.

The Court does not find any authoritative basis for such a distinction. The general doctrine limiting the immunity [fol. 1591] in the manner heretofore stated was formulated and enunciated by the Supreme Court in United States v. Borden Company, 308 U. S. 188, 204.

There is nothing in that case intimating that any such limitation as is now suggested should exist. This Court finds no authoritative or binding expression formulating such a qualification.

True, some expressions are cited from a number of District Court cases involving transactions of labor unions which tend to support the reasoning advanced on behalf of the Defendant in this respect.

Entirely aside from the fact that those expressions are not binding on this Court, it must be noted that the decisions involving labor union transactions are governed by

a somewhat different principle than those which apply to agricultural cooperatives.

To be sure, the same provision of law grants an immunity from the anti-trust laws to agricultural cooperatives as to labor unions; but in addition to that, other statutes, such as the Norris-La Guardia Act, and the National Labor Relations Act, the Labor-Management Act, add certain additional privileges to labor unions that are not accorded to agricultural cooperatives. It necessarily follows, therefore, that decisions involving labor unions are not necessarily apposite as to this point when an agricultural cooperative is involved.

[fol. 1592] In this connection, it is appropriate to call attention to the decisions of the Supreme Court in United State v. Hutcheson, 312 U. S. 219, and in Allen Bradley Company v. Local Union No. 3, 325 U. S. 797, 806, in which it was held expressly that:

"The Sherman Act, the Clayton Act and the Norris-La Guardia Act must be jointly considered in arriving at a conclusion as to whether labor union activities run counter to the anti-trust legislation."

Naturally, an agricultural cooperative can derive no benefit from the statutes relating to labor unions.

The Court, therefore, reaches the conclusion that the statutory immunity accorded to agricultural cooperatives does not apply to the transaction here involved.

In respect to the main issue here presented for decision, it has been held by the Supreme Court that it is unreasonable per se to foreclose competitors from any substantial market. International Salt Company v. United States, 332 U. S. 392, 396; United States v. Griffith, 334 U. S. 100, 107.

In addition, the case of United States v. Yellow Cab Company, 332 U. S. 218, generally supports the conclusion that is being reached here.

The Court concludes that the transaction involving the acquisition of Embassy Dairy by the Defendant constitutes [fol. 1593] a violation of Section 3 of the Sherman Act.

This oral opinion will constitute the findings of fact and conclusions of law. Counsel will prepare a judgment in accordance with the ruling and in the form indicated in the opinion rendered in this case on November 21, 1958.

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[fol. 1596]

OFFICIAL TRANSCRIPT OF PROCEEDINGS—January 22, 1959

[fol. 1598] PROCEEDINGS

The Deputy Clerk: United States v. Maryland and Virginia Milk Producers Association.

COLLOQUY BETWEEN COURT AND COUNSEL RE FORM OF FINAL JUDGMENT

The Court: Gentlemen, the Court has examined the drafts of the proposed judgments submitted by the respective parties.

Have you your draft, Mr. Saunders? You submitted a carbon copy.

Mr. Saunders: Yes, Your Honor, I have.

The Court: I think, Mr. Bergson, you submitted your original.

Mr. Bergson: Yes, Your Honor.

The Court: In examining the two drafts, the Court finds that the draft submitted by the Government goes beyond the scope of the Court's decision.

I thought really it was made clear in the opinion that all the Court intended to do by way of relief was to order divestiture of the assets of Embassy Dairy—of course, a complete divestiture, a bona fide divestiture—and a cancellation of the auxiliary contracts.

Now, the proposed judgment of the Government would go considerably farther than that and would grant certain other relief neither mentioned nor, I might say, contemplated by the opinion of this Court.

Now, if you would like to be heard upon that, Mr. Saun-
[fol. 1599] ders, I would be very glad to hear you.

Mr. Saunders: It may be helpful, Your Honor, to the Government if the Court would care to express its views as to the provisions which seem to go beyond the Court's decision.

The Court: Yes, I think that would be helpful. I made some notations on the carbon copy.

Well now, Paragraph III, Subsection (E), I see no reason for precluding the Defendant from engaging in the

wholesale or retail distribution of fluid milk prior to the divestiture. After all, that is like saying that the Defendant shall stop all of its business for the time being, because the distribution of milk is the business of the Defendant.

Mr. Saunders: Well, Your Honor, there may be a misunderstanding as to the terms, if that is what Your Honor reads in that section. It applies, as Your Honor will note, to the wholesale or retail distribution of fluid milk.

Now, the complaint makes clear, Your Honor, that the term, "fluid milk," as used throughout this case, refers to processed milk as a dealer would distribute it. There is nothing in this judgment that would bar the Defendant from selling raw milk to dealers, as it has for, lo, these many years.

If Your Honor reads this provision otherwise than as I have explained it, it is because perhaps we have not thought it necessary to repeat the definitions of the complaint in [fol. 1600] this judgment.

The Court: Yes. Well, even so, I don't see any reason why I should bar them from doing that.

Mr. Saunders: In other words, Your Honor raises a question about a restriction upon the right of Defendant to engage in competition with its own Embassy Division.

The Court: I am going to put it a little broadly. I see no reason to require the Defendant to do anything or to refrain from doing anything except to divest itself of the Embassy assets. That is all that I intended by my ruling.

Mr. Saunders: Well, I appreciate that Your Honor's opinion referred to what the Government considers to be the principal aspects of relief. But the Government—I want to emphasize this, Your Honor—believes that to have effective relief, and not just, as the Supreme Court said in the last anti-trust decision that it handed down, to win a battle but to lose the war, the Government has got to have relief which is effective.

Now, let's take the situation that Your Honor, in effect, it seems to me, is envisaging here, namely, that the Defendant may operate, while still operating Embassy Dairy prior to the divestiture, a dairy under some other name; and at the annual meeting or at the next monthly meeting

of the Defendant's board of directors, an officer or a man-
[fol. 1601] ager of one dairy appears to report on the operations of that dairy, and the manager or an officer representing Embassy appears, and it is reported to the board of directors—and this is prior to the divestiture, Your Honor—well, our Dairy X had a ten per cent increase in sales this month.

The Court: Let me see if I understand you. Is it your point that the Defendant should not establish a department which would compete with Embassy Dairy?

Mr. Saunders: We don't see, Your Honor, how—

The Court: Is that your point?

Mr. Saunders: That is right, Your Honor.

The Court: Doesn't the Defendant now distribute fluid milk?

Mr. Saunders: Not other than through Embassy Dairy.

The Court: Did it distribute fluid milk prior to the acquisition of Embassy Dairy?

Mr. Saunders: It did not.

The Court: Well, what did it distribute?

Mr. Saunders: It distributed raw milk, the unprocessed, unpasteurized milk which it delivered to dealer plants, and the dealers then distributed it in the form of fluid milk, as we have used that term.

The Court: What do you say about that, Mr. Bergson? I think there is some merit in Mr. Saunders' contention. In other words, Mr. Saunders' contention is that during the [fol. 1602] time between the date of the judgment and the divestiture, you should not do anything that would deflate the value of the Embassy assets.

Is that it?

Mr. Saunders: That is correct, Your Honor.

Mr. Bergson: I agree that we should preserve the Embassy assets, and there are other provisions in this decree that require us to preserve Embassy's assets. But I have two points to make on this, Your Honor.

Number one, I don't think it is necessary to protect the assets. If we should go out and compete with Embassy Dairy, and it deflates the value of Embassy Dairy, which I doubt, this could be taken into consideration and would be taken into consideration at the time in the purchase price.

But we also acquired Richfield-Wakefield Dairy, which Your Honor held to be a lawful acquisition.

Now, we lose the Richfield-Wakefield case, if this provision is in here; and further than that, we are prohibited from exercising our rights specifically given in the Capper-Volstead Act to enter into the retail business if we want to build a dairy of our own.

The Court: I am particularly impressed by your first point. What about that?

Mr. Saunders: Your Honor, I want to make something very clear, because I want to avoid any misunderstanding [fol. 1603] as to the factual situation that is here involved.

There is no Richfield-Wakefield Dairy in existence; no business conducted under that name. Only Embassy Dairy.

The Court: But suppose the Defendant should want to start up the Richfield-Wakefield Dairy. I don't think I should preclude them.

Mr. Saunders: Then we will come back to my example, Your Honor. I don't see how the Defendant can compete through Richfield-Wakefield and not in some way, in some measure, in some degree impair Embassy.

The Court: I think it would impair Embassy.

Mr. Saunders: I can't see how it would or could avoid doing so.

The Court: I think you are quite right; but would it be doing anything illegal if it does impair the value of Embassy by this means?

Mr. Saunders: There is nothing illegal, Your Honor, but we contend and very strongly so that to have effective relief in this case, Embassy has got to be restored and has got to be restored in such a way that the fact that it has been withdrawn from independent operation for four or five or maybe six or seven years, as the case may be, is completely eliminated.

The Court: I do not so look upon the case. The way I look upon it is this: That the Defendant should be de- [fol. 1604] prived of all the benefit that it received from acquiring Embassy Dairy. That, perhaps, is the converse of your statement.

Now, I am not going to include that in the decree. And that, of course, would apply to Section (F).

Now, going to IV (B), you have a clause there which Mr. Bergson included in his draft, too, and which, nevertheless, I am not going to allow; and that is, requiring the Defendant to give written notice of the provisions of the judgment to certain persons.

I have invariably objected to that type of clause on principle. I do not believe that when a court adjudicates that somebody has violated the law, that it should humiliate that person by requiring him to notify others that he has been so adjudged.

I have stricken a similar clause from other anti-trust decrees. I know that of recent years clauses of this kind have been put into orders of administrative agencies, particularly, and some anti-trust decrees. There is one administrative agency that particularly has been using it. I do not believe in that. I think that is just as wrong as it would be, or even more wrong than it would be to require a convicted criminal to walk down the street carrying a placard that: I have been convicted of a crime.

Now, that used to be done two hundred years ago. But it [fol. 1605] is contrary to modern ideas of humaneness and liberalism. Therefore, I never require a person who has been adjudged to have done an illegal act, whether it be criminal or just illegal, to have to notify others that he has been so adjudged.

Mr. Saunders: Would Your Honor consider—

The Court: I think the other parties to the contract will know anyway; and if not, you are at liberty to notify them.

Mr. Saunders: Thank you, Your Honor.

The Court: So I am going to strike that out. As I say, I have stricken other such provisions.

You know, if a criminal was required to walk down the street carrying a placard that he has been convicted of a crime, we would say that violates the Eighth Amendment against cruel and unusual punishment.

They used to do that in colonial days. In colonial days drunkards, who were convicted in what corresponded to Police Court, were often required to carry the letter "D" on their necks to notify people, as a matter of shaming and humiliating them. And, of course, we all remember Haw-

thorne's "Scarlet Letter." But I don't believe in that sort of thing.

Now, I think V (A) goes beyond the scope of my ruling, and V (B) does also. And it is also subject to the other objection that I have just stated.

[fol. 1606] Mr. Saunders: May I be heard on those provisions, Your Honor?

The Court: Yes, indeed.

Mr. Saunders: Your Honor, in the Section 3 case, found foreclosure of competing suppliers and producers who had supplied Embassy, those who competed with the Defendant, and also found—and this, I believe, is part of the findings of fact in the Section 7 opinion—that they had little alternative other than to join the Association or to go to Baltimore.

This provision, V (A), is designed to free such members of the Defendant as were those producers who may wish at their own option to withdraw from the Defendant. That is what V (A) is designed to do.

The Court: I know; but that goes beyond my ruling.

Now, Paragraph VI, I think, also goes beyond my ruling; and I particularly consider objectionable the last sentence of VI (A).

I shall do nothing to permit the lowering of the standards of milk in the District of Columbia.

Mr. Saunders: This provision does not do that, Your Honor.

The Court: I beg your pardon?

Mr. Saunders: This provision does not do that.

The Court: It would.

[fol. 1607] Mr. Saunders: It doesn't change the existing situation at all, Your Honor.

The Court: "In complying with the provisions of this subsection . . ."—

you say—

". . . Defendant shall not require, as a condition of purchase, that milk meet any standard or quality requirement other than applicable Federal specifications for milk for resale as fluid milk to the Federal Government."

Now, we know that the District of Columbia standards are higher than the Public Health Service standards. What

you would do here would be to scrap the District of Columbia standards and bring the District of Columbia back to the Public Health Service standards.

I am not going to do that.

Mr. Saunders: In so far as Federal Government purchases of milk are concerned, the Public Health standards are applicable today, Your Honor.

The Court: I understand. Then this sentence is unnecessary.

Mr. Saunders: I am perfectly willing to strike it. I think it is unnecessary, but we want to play safe here, Your Honor.

[fol. 1608] The Court: I am not going to say anything which might be construed as an approval of the idea of lowering milk standards. I think one of the commendable things about the way the District of Columbia Government has administered the distribution of milk in this city is the high standards that it has exacted.

Now, I have no doubt that the Public Health Service standards are good, because if they were not, I am sure the Public Health Service would not have approved them. But our local standards are still higher; and I believe in maintaining them.

Mr. Saunders: Do I understand that Your Honor would permit VI (A) to be included without that last sentence?

The Court: No. That is an additional objection. But I think the entire VI, both (A) and (B), goes beyond my ruling.

Mr. Saunders: May I be heard on the need for such provisions, Your Honor?

The Court: Yes, indeed.

Mr. Saunders: The Supreme Court has held, in any number of cases in which defendants have been found guilty of violation, or liable as violators of the anti-trust laws, that the Government is entitled not only to win the battle but also to win the war.

Now, these provisions, Your Honor, are designed to pry [fol. 1609] open the Embassy market. This provision, in particular, to pry it open right from the very beginning.

I want to point out frankly any number of factors could arise, entirely without the control of the Defendant. I am

not suggesting in any way that the Defendant wouldn't make good efforts to dispose of Embassy.

There may be an appeal in this case. This judgment may not be effective for two or three years. Economic conditions may change meanwhile.

The Court: Of course, if an appeal is taken, and if an application is made for a stay— By the way, I never put stays in the original order or judgment. I notice both of you have that. That goes out. You have to make an application for a stay after the judgment is signed and after you have taken steps to note an appeal. Perhaps the latter requirement is not always necessary; but I do not consider the question of the stay until after I sign the judgment or order. I always feel a judge stultifies himself if he puts a stay right in his own order.

Now, if I grant a stay, of course, one of the provisions will be that the appeal must be expedited. And, of course, there having been daily transcript, it should take practically no time at all to prepare the record on appeal. Ordinarily, the biggest lapse of time consumed in preparing a record on appeal is for the preparation of the transcript [fol. 1610] by the court reporter. Here, you have the transcript. All you have to do is file the original transcript and the exhibits, and print such portions of them as are relevant.

Mr. Saunders: Directing the Court's attention again, Your Honor, to VI (A), I would like to develop this for just a few moments.

The Court: Yes; I will be glad to hear you. This is an important matter.

Mr. Saunders: I would like to quote from the International Salt case, the case which Your Honor cited in his opinion on the Section 3 issues.

I am quoting from Page 401 of 332 U. S.:

"In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition . . . "

The Court: Yes, that is all correct. But why are you entitled to Paragraph VI?

Mr. Saunders: Because, Your Honor, as I indicated, this pries open, for the benefit of the Government in particular —and Embassy, as the Court will recall, was an important factor in the supplying of milk to Federal installations— from the first effective date of this judgment.

[fol. 1611] Now, I would like to point out in the International Salt case, the Supreme Court concluded the quote I was reading to the Court as follows:

"If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause."

In the most recent anti-trust decision by the Supreme Court, that of January 12 of this year, in the International Boxing case, the owners of Madison Square Garden were given five years in the stock situation in which to divest.

The Court: I read that. Of course, the majority opinion is binding on me, although I feel there was a great deal of merit to the dissent.

That was decided on the facts of that particular case, and that case involved more than a single transaction. Here, the Court has adjudicated only a single transaction to be invalid, and I am going to do everything to see that that single transaction is undone. But beyond that, I am not going to put this Court into the milk business and supervise the distribution of milk.

Mr. Saunders: It is true, Your Honor, that a single transaction is here involved, but we have to look at what that transaction did. Five transactions could have been involved and accomplished no more. So looking at the end result, we have a foreclosure of ten per cent of the market and, [fol. 1612] let's say, fifty per cent, roughly, of Government business through this Embassy outlet.

Now, I cite the boxing case because though divestiture was ordered, the Madison Square Garden which was ordered divested was required right from the beginning to lease its facilities independently. In other words, an instance where despite the fact that divestiture might be allowed to take some time, a prying open of that outlet, that market was to begin at once.

The Court: Well, I am not going to do that here, Mr. Saunders. I am not going to require the Defendant to do

anything except to undo the transaction which I have held is illegal.

Mr. Saunders: Might I also cite another reason, Your Honor? The undoing will take some time. This will help to undo it right at the outset, as soon as this judgment becomes effective.

I would like to come back to this other point, Your Honor. There is no assurance, despite the efforts of Defendant, that divestiture will take place within a year. As I say, circumstances beyond its control may affect this situation. There may be no purchaser. Economic conditions may be such as to suggest that it is not desirable to go into the milk business at this particular time. Accordingly, some measure of relief, and relief related directly to this trans- [fol. 1613] action will be afforded right from the outset.

The Court: What, specifically, do you intend to accomplish by Section VI?

Mr. Saunders: By this provision, the Defendant will be required, beginning with the first—I might refer to it as a contract period, because the Government ordinarily contracts on the basis of calendar quarters—contract period, to take seventy-five per cent of its requirements for milk for that utilization from other sources.

The Court: I am not going to direct the Defendant where to buy its milk.

Mr. Saunders: We are not telling it where to buy it, but we say they have to buy from somebody else.

The Court: Well, I am not going to tell them that. I am not going to grant that.

Mr. Saunders: Your Honor, may I ask, has Your Honor considered Paragraph VI (B)? I assume our discussion was concerned with VI (A) up to this point.

The Court: Well, VI (B) is the same sort of paragraph. As I say, I am not going to make any directions as to how the Defendant should conduct its business beyond the direction that it must in good faith undo the transaction which I have held to be illegal.

Mr. Saunders: Well, Section VI (B), Your Honor, as you may recall, provides that if the divestiture has not [fol. 1614] occurred within the time specified, then Embassy is pried open in this other way. It is completely different

from VI (A) in that it doesn't become effective until they haven't divested within the year's period.

The Court: If they have not divested in the year's period, you apply for additional relief at the foot of the decree.

Mr. Saunders: Knowing what is in the offing may encourage the divestiture to take place.

The Court: I will encourage them right now by saying if they do not divest within the year, you come before me and apply for additional relief, by way of penalty or enforcement, at the foot of the decree.

Now, I dislike Paragraph IX. There again, there is a difference of basic philosophy. I know there are those that differ from me, but to me, the Attorney General is counsel for one of the parties. He is not an enforcement officer. I used to preach that when I was in the Department of Justice to some of my colleagues.

When I say the Attorney General, I mean the Department of Justice generally. I am not referring to the Attorney General as a person, naturally. I do not believe the Department of Justice should be given carte blanche to examine books and papers of the Defendant at any time. That savors too much of a police measure, to me. Talk [fol. 1615] about a police state; that is a police state.

You know, it is a funny thing. The courts have gotten into the habit of protecting criminals against infringement of their rights, but when it comes to businessmen, why, they do not have the same safeguards.

I do not take that view. I take the view that everybody has the same safeguards. Now, with a criminal, this would be an unlawful search and seizure. If there is any reason for examining books and papers, you may make an application at the proper time to this Court at the foot of the decree.

Mr. Saunders: May I be heard on that, Your Honor?

The Court: Yes.

Mr. Saunders: This Defendant stands before the Court adjudged to have violated the anti-trust laws.

In the Crescent Amusement Company case, the Supreme Court said:

"The pattern of past conduct is not easily forsaken."

The present case is a case in which the specific intent to restrain trade has been established. I am referring now to the Court's opinion again.

The Court: Mr. Saunders, if you wish to comment on this, suppose you direct your remarks strictly to the four corners of this provision.

As a remedial measure, I do not believe in granting this [fol. 1616] privilege to the Department of Justice or imposing this burden on the Defendant.

Let's take an analogy in the criminal court. If we convict the defendant of mail fraud, for example, or being a fake promoter, we cannot provide that hereafter all his books and records shall be open to inspection by the Department of Justice or by the Metropolitan Police Department. If we put that in any court order, both the Court of Appeals and the Supreme Court would say that is an unlawful search and seizure.

Mr. Saunders: The difference, I think, Your Honor, is that that is a criminal case. This is an equity case where injunction is sought.

The Court: Yes, I know. But I am not going to do something to honest people that I could not do to criminals.

Mr. Saunders: Your Honor, may I hand to the Court the case of United States v. National Lead, where this sort of provision is printed in the footnote to the Supreme Court's opinion in that case. Page 333, Your Honor.

The Court: Mr. Saunders, the Supreme Court did not say it was mandatory on the judge.

Mr. Saunders: I agree with Your Honor.

The Court: To include such a provision. If the Supreme Court said that, even though I disagree with that direction, I would follow it. All that the Supreme Court said was that [fol. 1617] the Court has discretion to include such a provision. I realize I have such discretion. I am not going to exercise it, for the theoretical reason I have indicated, because I do not believe in that sort of a provision.

As I say, if I cannot order a criminal to submit his books and records for inspection, I am not going to order honest people to do it.

Mr. Saunders: But the criminal, in the case Your Honor refers to, is not under injunction to do something, where

the public interest, it seems to me, warrants some attempt to find out what he is doing.

The Court: Suppose at the behest of the Securities and Exchange Commission someone was enjoined from continuing to sell certain securities. I do not think that decree could legally provide that the Securities and Exchange Commission could enter his office at any time and examine his books and papers at any time in the future; and certainly, if it legally could do so, I would consider it improvident on my part to do it.

Mr. Saunders: If permitted, I would like to make a distinction between that case and this.

Of course, I can see where to prove that you are not doing something by allowing someone access to your offices does present much more of a problem than to see whether you are doing something as is required by this judgment, [fol. 1618] in that they are supposed to attempt to sell the business.

The Court: I consider that I would be violating perhaps not the letter but the spirit of the Fourth Amendment if I put in Paragraph IX. I am going to disallow it.

Now, gentlemen, it seems to me that I ought to use the Defendant's draft as a basis for my decree. I rather like the form of the Defendant's draft anyway.

Now, if you will turn to that, I will make certain changes in it, too.

If you will turn to Page 2, Paragraph 4.

As it now reads:

"Within one year from the date of the expiration of the stay granted herein, the Defendant shall dispose . . . "

and so on.

I shall change that to read:

"Within one year from the date hereof, the Defendant shall dispose . . . "

and so forth.

Then if you ask for a stay, that is a different matter.

Now, No. 5—

Mr. Saunders: May I interrupt, Your Honor?

The Court: Yes.

Mr. Saunders: If we are going to proceed through it, may I be heard on these paragraphs?

[fol. 1619] The Court: Yes, indeed.

Mr. Saunders: Paragraph 4, Your Honor, on the face of it, appears to accomplish what Your Honor, I take it, intends to accomplish. However, it does not do so.

The Court: Why not?

Mr. Saunders: This provision requires the Defendant to divest itself of the assets which it acquired on July 26, 1954.

Now, it also provides, of course—

The Court: "Or replacements therefor."

Mr. Saunders: Does this provision mean that all the business of Embassy Dairy, customers, customer routes, customer accounts which it has acquired since July 26, 1954, and which are necessary to make Embassy a vigorous and substantial factor—

The Court: That is an asset.

Mr. Saunders: I don't believe the Defendant interprets it that way.

The Court: Why not say, "tangible or intangible."

Mr. Saunders: That is why, Your Honor, we included in our draft this provision. I ask the Court to go back to our draft.

"To dispose of as a unit and as a going dairy business all assets acquired on or about July 26, 1954 from Embassy [fol. 1620] Dairy, Inc., which are in the possession of Defendant at the date of the disposal required by this subsection, together with all other assets used as of such date."

The date of disposal.

The Court: I do not like complicated verbiage anyway.

Mr. Saunders: I am willing to avoid it if we accomplish the result intended.

The Court: I am perfectly willing to insert, "tangible and intangible."

Mr. Bergson: I would agree to that.

The Court: " . . . all assets of Embassy Dairy, Inc., tangible and intangible."

Mr. Saunders: And the phrase, "or replacements therefor," includes all business acquired by Embassy Dairy while it was operated by the Defendant.

The Court: " . . . all assets of Embassy Dairy, Inc., tangible and intangible, which it acquired on July 26, 1954, or replacements therefor."

I think, "and now in its possession" ought to go out. You cannot possess an intangible asset. Possession only applies to tangibility.

Mr. Bergson: The problem there, Your Honor, is that [fol. 1621] some of these assets may have been sold already and we wouldn't want to be in violation.

The Court: Well, you cannot dispose of anything that you haven't got.

Mr. Bergson: Trucks and things like that.

The Court: If you haven't got them, you cannot dispose of them.

Mr. Bergson: Right.

The Court: I am going to strike out the words, "and now in its possession."

Mr. Saunders: Your Honor, at the risk of being repetitious here, I want to make certain I understand.

The Court interprets the language that it has now, I understand, adopted to require the Defendant—if Embassy in 1956 acquired a new customer account—to divest of that business, as well. Is my understanding correct?

You see, Your Honor, what I am afraid of is this: There is a good turnover in this business. Embassy was doing a seven or eight million dollar business in 1954; but of the business it then had, it may have at the time of divestiture only fifty per cent of such business. The Defendant has replaced some of that business with new business. If we restore Embassy, an anemic Embassy—

The Court: "Or replacements therefor." I would construe—and the record will so show—"replacements there-[fol. 1622] for" as covering that.

Mr. Bergson: I would go even further, Your Honor, to make the record clear. What we want to preserve is what we acquired from the acquisition of Richfield-Wakefield.

The Court: Yes.

Mr. Bergson: And anything that we acquired as a result of Richfield-Wakefield, we don't consider a part of the Embassy assets.

Mr. Saunders: They are, in fact, a part of such assets.

The Court: I think the words, "replacements therefor," as I have just now construed it, will preserve your rights.

Now, Paragraph 5, I am going to change as I did Paragraph 4. The second sentence. I am going to change the words, "within sixty days from the expiration of the stay granted herein," to read as follows:

"Within sixty days from the date hereof."

Now, I am a little bit troubled by the last sentence of 5.

"All such reports shall be held confidential."

Do you agree to that, Mr. Saunders?

Mr. Saunders: Indeed, we don't, Your Honor.

The Court: That does not appeal to me, Mr. Bergson.

Mr. Bergson: May I give you our reasons, Your Honor?

These reports are going to show negotiations that we are [fol. 1623] having with various purchasers of Embassy Dairy. If it becomes known on the street that we are in negotiations for Embassy Dairy, the business of Embassy Dairy may disappear, because customers are fickle. The purpose of this is to preserve the assets of Embassy Dairy, not to keep anything from the Department of Justice or from the Court. But if these reports are published, and prospective customers come down and look to see what other people are offering on this—

The Court: But they should not be confidential from Government counsel.

Mr. Bergson: No, no.

The Court: The way it reads now, only the Court would have access to it.

Mr. Bergson: No. What we intended there was confidential from the general public. The Court and Government would have access to it.

The Court: Would there be any objection to that?

Mr. Bergson: We can't see any useful purpose served by having it known all over the market.

Mr. Saunders: Your Honor, we believe a situation such as Mr. Bergson refers to, should it arise, may be taken care of by the right of the Defendant to come to this Court and seek a modification or provision in that case that the latest offer which they may be negotiating on may be kept

confidential. We oppose this idea of imposing a blanket confidentiality.

[fol. 1624] The Court: I am inclined to agree with Mr. Saunders.

I state to you now that if any report contains pending negotiations that have not come to fruition, you may, immediately prior to that report, apply at the foot of the decree that it be kept confidential from the public and that only Government counsel and the Court have access to it.

I would rather not have a general provision to that effect.

Mr. Saunders: May I go back one sentence in this provision, Your Honor?

The Court: Yes.

Mr. Saunders: The provision as suggested by Defendant requires:

"Further reports shall be made to this Court on such dates as this Court may order."

The Court recalls the Government provision is much more specific; set up a timetable. This is very vague. It requires us to be coming back to the Court to have it effectuated.

The Court: This is in accordance with what I ruled. I ruled that there should be a report within sixty days; the divestiture should be within a year.

Mr. Saunders: Our suggestion in our provision, Your Honor, was every ninety days.

[fol. 1625] The Court: I am inclined to agree with that.

Any objection to that?

Mr. Bergson: I don't think so, Your Honor. I don't see any.

The Court: "Further reports shall be made to this Court every ninety days thereafter, and on such other dates as this Court may order."

Mr. Saunders: May I ask Your Honor for one additional provision?

It may be that a purchaser will show up at such time as will not fit within this ninety-day schedule. Obviously, the Government will be interested to know of any proposed purchase.

The Court: That is why I said, "and on such other dates as this Court may order."

Mr. Saunders: The Government has suggested in its draft, Your Honor, that we be advised forty-five days prior to the effectuation of a divestiture. In other words, once the deal is lined up, we be given sufficient notice as to what the terms and conditions are, and who the purchaser is, to be heard on it if it would appear to be desirable or necessary.

The Court: Well, now, why do you want to be heard on who the purchaser is?

Mr. Saunders: Your Honor, it is entirely possible, of [fol. 1626] course, that such purchaser as might show up in this situation might be one of the firms, for example, here in town, with a dominant share or a large share of the market, and we might well oppose it.

The Court: Then you could come and ask that they be punished for contempt for not complying in good faith.

Mr. Saunders: Isn't it simpler to provide the Defendant notify us sufficiently in advance when a deal is lined up?

The Court: There seems to be some merit to that. What do you say about that?

Mr. Bergson: I think they would have to be notified in advance, Your Honor. I think under the ordinary rules, they would get five days' notice of any application that we would make for approval.

Mr. Saunders: There is no provision here that you would have to get the approval of the Court for the particular divestiture.

We made that suggestion, Your Honor.

The Court: If there were such a provision, then I suppose Mr. Saunders would not make his present argument. I think there ought to be.

Mr. Bergson: I think we have it in here, Your Honor.

The Court: Well, maybe you have. I do not recall it.

Mr. Bergson: In Paragraph No. 5.

"The divestiture herein . . ."

[fol. 1627] The Court: " . . . shall require the prior approval of this Court."

That settles that.

Mr. Saunders: Our concern, Your Honor, is—and Your Honor knows I am not trying to justify an unnecessary delay because of the way the Government operates—that five days for the Government to assess the competitive effects of the transfer of the business to Purchaser X leaves us very little time.

The Court: You can always get a continuance. I think I will do this; however:

"The divestiture herein ordered shall be in good faith and shall require the prior approval of this Court on notice to counsel for the Plaintiff."

In other words, it should not be an ex parte matter.

Mr. Bergson: Of course, Your Honor, we hadn't intended it that way.

The Court: I know you didn't, but I think I ought to make that clear.

Mr. Saunders: As long as we are doing that, Your Honor, am I pushing too hard by suggesting the incorporation of a thirty-day advance notice there? A transaction like this is not ordinarily negotiated and consummated—

The Court: You can ask for a continuance of the hearing. [fol. 1628] I am inserting the words, at the end of the first sentence of Paragraph 5, as follows:

" . . . on notice to counsel for the Plaintiff."

I think Paragraph 6 is all right.

Now, Paragraph 7—

Mr. Saunders: Your Honor, I don't want to interrupt unnecessarily, but if we are proceeding paragraph by paragraph, I assume Your Honor will let me make any comment I feel necessary.

The Court: Yes.

Mr. Saunders: This would again require comparison with the Government's proposed draft. We feel that the language in Paragraph 6 is very weak, ambiguous and vague.

"Pending divestiture, Defendant shall administer . . . "

What does "administer" mean?

The Government's provision, as Your Honor may recall—and I believe this is as simple as you can make it. I know

Your Honor tries to avoid lengthy and cumbersome ways of getting to a result.

Our provision in Paragraph (E) was that:

"Pending disposition of the assets referred to, the Defendant shall take such steps as are necessary . . . "

The Court: What paragraph?

[fol. 1629] Mr. Saunders: Paragraph (E), Your Honor.

The Court: Of what?

Mr. Saunders: On Page 4 of our draft, the Government's draft.

The Court: Oh, yes.

Well, I think that the first sentence of Paragraph 6 of the Defendant's draft contemplates everything that you say.

Mr. Saunders: We don't think so, and may I explain why, Your Honor.

This requires the Defendant to administer the assets acquired from Embassy. Now, that doesn't make any provision with respect to subsequently acquired assets.

The Court: I think this would cover it, "replacements therefor."

Mr. Saunders: I am glad if we can include that. That will take care of part of the problem.

The Court: Suppose we insert, "and replacements therefor," after the words, "Embassy Dairy, Inc."

Mr. Saunders: That is a help, Your Honor.

Then, continuing along that line:

" . . . in good faith as a going dairy business with a view to preserving the said assets in as good condition as possible."

[fol. 1630] Our provision, as Your Honor will note, sets a standard which will control here; namely, they have to keep it in as good condition as it is right now.

The Court: I am satisfied with the provision in the Defendant's draft. I am not so sure that you can always keep an asset in as good condition as it is at any particular moment.

You know, I had occasion to rule on a point of this sort in a tax case in the Court of Claims, in which I sat last

June, where the Internal Revenue Bureau held that a lessor could not charge depreciation if the lease provided that the lessee shall deliver back the property at the conclusion of the lease in as good a condition as he received it.

I wrote the opinion, and the other members of the Court unanimously concurred, there still would be depreciation and that the lessor was entitled to charge it.

I am going to leave this.

Mr. Saunders: Your Honor, may I say something further on that?

The difference, I believe, between the two provisions, their provision and the Government's provision, is this: This does not require the Defendant to replace an asset which may be exhausted.

The Court: Well, I am not going to require them to do that.

[fol. 1631] Mr. Saunders: Embassy can be allowed to run down hill.

The Court: They must administer the assets in good faith as a going dairy concern.

For instance, if they have a fire and a lot of their trucks are burned up, they would have to buy other trucks, because they have to maintain it under this provision as a going dairy business. I think this is sufficient protection. If you find any lack of good faith, all you have to do is to make an application at the foot of the decree.

Mr. Saunders: The further provisions of this paragraph, Your Honor, as you may note, are retroactive in effect. For example, beginning—

The Court: Gentlemen, we are spending an awful lot of time on this. I have a jury case on trial, and I interrupted it for this. Let's move along a little more expeditiously.

Mr. Saunders: Your Honor, referring to the point that I was making, the last sentence on Page 2 in Paragraph 6 provides that:

"If deemed advisable in the operation in good faith of the said dairy business, capital improvements may be made and the value of any capital improvement made after July 26, 1954 . . ."

That is prior to the date of this decree. It would give [fol. 1632] it a retroactive effect. That is my first point on this sentence.

Secondly, they provide, in determining the reasonableness of any offer of purchase of the business, these capital improvements shall be taken into account.

It seems to me that the Court, in determining whether a reasonable offer is made, is automatically going to take into account the assets.

The Court: I don't see any reason for the clause, Mr. Bergson, that the value of capital improvements shall be taken into consideration. You can argue that at the proper time. I do not think that should go into the decree.

Mr. Bergson: I have no objection.

The Court: I will put a period after, "capital improvements may be made," and strike out the balance of the sentence.

Mr. Saunders: How about the balance of the paragraph, Your Honor?

The Court: Well, if you want it stricken, I shall strike it, but I should think you would want it in, Mr. Saunders.

Mr. Saunders: Well, the last sentence is rather ambiguous.

The Court: I am referring to the last sentence. If you want it stricken, I shall strike it, but I should think you would want it.

Mr. Saunders: If they are operating in good faith, I [fol. 1633] don't see that it would make any difference. But if it is to be kept in, it is ambiguous. What is the value referred to? The original value, the depreciated value, the fair market value? It doesn't say.

The Court: Well, I will determine that, if the question arises, at the proper time.

If you wish, I will strike it out, but I thought it was for your benefit.

Mr. Saunders: In that case, since you find it beneficial to the Government, the public, I might suggest the figure be set at $10,000.

The Court: I think that is reasonable. Any objection to that?

Mr. Bergson: No objection, Your Honor.

The Court: I will change the $25,000 to $10,000.

Now, as to Paragraph 7, I have stricken out the last sentence. It seems to me that otherwise, it is proper.

Now, Paragraph 8, I think is proper, except I do not like the clause, "for the modification of any of the provisions thereof."

I do not want to invite counsel to apply for modifications of this judgment. Unless there is objection, I shall strike out that clause.

Mr. Saunders: I might say, Your Honor, it is customary in all anti-trust decrees to have this phrase in.

[fol. 1634] The Court: I beg your pardon?

Mr. Saunders: It is customary in all anti-trust decrees to have this clause in.

The Court: Very well, then I shall have an innovation.

Now, my striking out this clause does not bar anybody from applying for modifications; but I just do not want to extend an invitation for applications of modifications.

Now, 9, I am striking out.

Now as to costs. The Government's draft provided for costs; the Defendant's draft provided:

"Neither party shall be allowed costs."

It seems to me that in view of the fact that on two of the causes of action the Government prevailed and on two other causes of action the Defendant prevailed; that neither party should recover costs.

Mr. Saunders: Might I point out, Your Honor, in connection with the causes of action in which the Government prevailed, the costs were far more substantial.

On the Section 2 charge, no witnesses were called by the Government; nor were any witnesses called on the Section 7 charge.

We had discussed informally with counsel as to whether some proration would be possible. I don't think that they are equal, in other words, Your Honor.

The Court: I do not believe the costs are equal either, [fol. 1635] but I also have in mind the fact, the inequitable fact—we all know it is inequitable, but it is statutory—that if a party prevails in an action against the Government, he may not recover costs.

Suppose the co s were greater on the causes of action on which the Defendant prevailed. The Defendant could not recover costs. Now, it happens that probably the costs are greater on the causes of action on which the Government prevailed. It is only fair, substantial justice, I think, that neither side should recover costs.

I must say that the Government, in a civil suit, is in a different position from a private litigant. The Government counsel are paid salaries, inadequate salaries. They are not paid fees; so the Government does not have the extra expenses caused by the particular litigation. The work for which costs could be taxed was done by salaried employees. So I am disinclined to allow costs. I will not allow costs.

I think that disposes of the matter.

Mr. Saunders: Again, Your Honor, I seem to keep coming back. I am afraid, however, it doesn't, because there are a few—just a few, I assure Your Honor—points that I think I should raise.

The Court: Very well.

Mr. Saunders: We skipped over the recitals here.

The Court: I rather like the recitals contained in the [fol. 1636] Defendant's draft.

Mr. Saunders: I understand that, but may I suggest a few changes?

In the second line, "Plaintiff's cause of action," should be "causes."

The Court: I think that is correct.

Mr. Saunders: The same thing would be true in the fifth line.

The Court: Yes.

Mr. Saunders: Now, down in Paragraph 1 of the decree, itself—

The Court: Yes.

Mr. Saunders: —the word "contract" at the end of the second line should be plural.

The Court: Oh, of course.

Mr. Bergson: Where was that, Mr. Saunders?

Mr. Saunders: The end of the second line in Paragraph 1.

The Court: That should be "contracts" instead of "contract."

Mr. Bergson: There is only one contract ancillary thereto.

The Court: Well, Mr. Saunders obviously refers to these auxiliary contracts.

Mr. Bergson: There is only one.

[fol. 1637] The Court: No, no.

Mr. Bergson: There was one contract signed by a lot of people.

Mr. Saunders: But they were all agreeing by and between the Association and these respective parties.

Mr. Bergson: It was one document, Your Honor.

The Court: It may be a single document, but separate contracts.

Mr. Bergson: I don't think it is particularly important.

The Court: A contract is more than just the document on which it is written.

Mr. Saunders: Is Your Honor making it plural?

The Court: I am making it plural.

Mr. Saunders: May I suggest to Your Honor that in Paragraph 2, there should be a comma after "Richfield Dairy Corporation."

The Court: Very well.

Mr. Saunders: And also after, "Wakefield Model Farms Dairy."

The Court: Very well.

Mr. Saunders: In Paragraph 3, I raise a question as to the form, Your Honor. The contract of May 26 was an agreement to purchase; it was not the agreement of sale. The language here, Your Honor will notice, is, the contract of this date by which the Defendant acquired. The acquisi-

[fol. 1638] tion, the consummation took place two months later.

The Court: I think your criticism is correct. It was an executory contract.

Mr. Bergson: The charge on which Your Honor found violation was that the contract of May 26 and the ancillary contract—

The Court: That is quite correct. But Mr. Saunders' criticism is merely to the use of the words, "by which Defendant acquired."

Mr. Bergson: "Pursuant to which."

The Court: "Pursuant to which," yes.

Mr. Saunders: And I raise the further question, Your Honor, whether this isn't too narrow a provision, because the evidence developed a number of agreements which are all part of the transaction. And Your Honor used that term, if you recall, in your opinion, in your findings.

The Court: Well, I think Paragraph 1 covers that, "contracts ancillary thereto."

Mr. Saunders: It wouldn't cover, Your Honor, the bill of sale, itself, the actual sales agreement; nor would it cover the agreement of the Defendant by which it agreed not to compete outside the Washington Metropolitan Area.

The Court: Well, here is what we will do. Make it, "and the ancillary contracts," in the second line of Paragraph 3, instead of "contract," and strike out, "of the same date." [fol. 1639] That covers them all.

Mr. Saunders: Now, Your Honor, that leaves one more thing. Because this, I think, is vital to this judgment, I want to make certain that all the parties, as well as the Court, understand what this decree provides.

I refer to Paragraph 4, and the provision:

"Such assets . . ."—

referring to those which I think we got straightened out—

". . . shall not include assets of Richfield Dairy Corporation and Wakefield Model Farms Dairy."

The Court: What is your point there?

Mr. Saunders: My question, Your Honor, is that some of those assets are, of course, presently used in the Embassy business. They are so inextricably intertwined that to pull them out would do something, something bad so far as we are concerned, so far as Embassy is concerned.

We have no objection, Your Honor, to allowing them to dispose of, retain, do whatever they want with Richfield-Wakefield assets which have not been combined with Embassy.

The Court: You know, I was wondering when I first read this draft as to whether that second sentence of Paragraph 4 was necessary at all.

When a person is ordered to dispose of some assets, you do not have to add, but that does not include some other [fol. 1640] assets.

Mr. Bergson: We wanted to make it abundantly clear for our own protection, Your Honor, because Mr. Saunders had indicated to us that it included the Richfield-Wakefield assets so far as he is concerned.

The Court: It seems to me Paragraph 2 of the decree takes care of that.

Mr. Bergson: So long as it is understood as to what it means, I don't care whether the sentence is in there.

The Court: I am going to strike out that sentence because, obviously, when the Court directs you to dispose of Embassy assets, it means you do not have to dispose of any other assets.

Mr. Saunders: Your Honor, let's take a concrete situation to make certain we all understand. What of an asset which was a Richfield or Wakefield asset which, after the acquisition of those two companies, was made an Embassy asset? What happens to it? It is now an Embassy asset.

The Court: Well, it seems to me that the requirement of administering the assets acquired from Embassy Dairy and replacements therefor in good faith would cover that.

Suppose, for example, among the assets of Wakefield Dairy there were a few trucks, and you are using those trucks in connection with the Embassy business. Well, they are included in the decree, of course. They are part of the [fol. 1641] Embassy assets.

Mr. Bergson: If they were replacements for Embassy trucks.

The Court: Yes.

Mr. Bergson: But if they were not replacements for Embassy trucks, but if they were additions—

Mr. Saunders: Here we come to the practical problem which underlies the Government's concern, Your Honor.

The Court: Here is the situation. Suppose they enlarged the Embassy Department. I do not know if it would be the fact, but I am taking this as a fictitious case. And because they enlarged the Embassy business, they took some trucks that used to belong to Wakefield and impressed them into use for the additional Embassy business, in addition to the old Embassy trucks. I do not think that the Richfield or Wakefield trucks should be comprehended by this divestiture.

Mr. Bergson: That is our position.

The Court: On the other hand, if some of the old trucks wore out and were replaced by some Wakefield trucks, why then they would be covered by this decree as a replacement.

Mr. Bergson: Quite right. That is exactly the way we understand it and intended.

The Court: Of course, a record is being made of this discussion, so that may help both of you gentlemen in the future.

[fol. 1642] Mr. Bergson: Our purpose in putting this sentence was as a result of our conferences with Mr. Saunders; and we didn't want to be cited for contempt in doing what we thought we had a right to do.

The Court: I am striking out the second sentence in Paragraph 4.

Mr. Saunders: This is where we are concerned, frankly, more so than the trucks.

What about a customer account which was a Wakefield account, but since the acquisition by Defendant of Wakefield has been serviced and treated as an Embassy account?

The Court: You cannot sell customers. Customers are human. They have their rights, too. Suppose a customer of Embassy says: Well, you are selling the Embassy Dairy because the Court ordered you to to Corporation X. I don't know Corporation X. I want to keep on buying milk from you. I think he would have a right to do that.

Mr. Saunders: I agree, he would have a right, but would the Defendant have a right to say: We are going to break out the Wakefield part of this business and we will designate this as an account that you, Wakefield—or whatever the name shall be—shall solicit.

The Court: I think that is all covered by the good faith provision.

I want to say this: That I always put a very broad con-[fol. 1643] struction on the words, "good faith." And any time the Government finds anything not done in good faith, you just make an appropriate application to the Court, and I will entertain it sympathetically.

Mr. Saunders: Well, Your Honor, I hate to seem to be imposing upon the Court's time.

The Court: You are not imposing upon the Court's time. You are imposing, if you are imposing at all, upon time that ought to be devoted to other litigants.

Mr. Saunders: And, of course, that is the time of the Court as well.

My point is this, Your Honor. It seems to me by spelling this out once and for all, we may well avoid—and I can't conceive that this can be carried out without us having to come back to Your Honor under the present language.

The Court: How would you spell it out?

Mr. Saunders: Our draft attempted to do that, Your Honor.

The Court: Where have you spelled it out?

Mr. Saunders: In Paragraph (A) of III, Your Honor, Page 2.

The Court: On what page of your draft?

Mr. Saunders: Page 2, Paragraph III, Subsection (A).

The Court: Paragraph III (A)?

Mr. Saunders: That is right, Your Honor.

The Court: Well, that may be too broad, too. I think [fol. 1644] I will leave the matter as it stands, Mr. Saunders. This may be ambiguous on the other side. I am going to leave this; but I want to say to both counsel, the Court is always open for applications at the foot of the decree.

Mr. Bergson: Do I understand, Your Honor, in saying that you are going to leave Paragraph 4 of our draft as it is, you mean you are striking out the last sentence?

The Court: I am striking out the last sentence. So Paragraph 4 will read as follows:

"Within one year from the date hereof, the Defendant shall dispose of as a unit and as a going dairy business all assets of Embassy Dairy, Inc., tangible and intangible, which it acquired on July 26, 1954, and replacements therefor."

"Or" should be changed to "and."

Mr. Saunders: Your Honor, counsel have discussed a number of practical considerations here, and that is what I have in mind.

I don't want to belabor this point, but it is such that I don't know, frankly, where we stand. That is why I am concerned.

The Court: I always like equity decrees to be short and succinct and pointed, and not to go into too many details. It is humanly impossible to forecast every possible con-
[fol. 1645] tingency that might arise; and if you anticipate certain contingencies, then you are liable to have the decree construed as though other contingencies are not covered. Whereas if you have a direct, unambiguous, broad clause, then it covers all possible contingencies.

Now, if disputes arise, you come back here.

Mr. Saunders: For our guidance, Your Honor, may I suggest a concrete situation which in the record here will give us some indication of how Your Honor construes this paragraph?

The Court: Yes.

Mr. Saunders: Suppose the Defendant, as the case was, acquired assets, physical assets, plant equipment from Embassy. Two years later, they installed machinery to make Embassy more efficient. It wasn't strictly speaking a replacement. It saved labor and made it unnecessary to hire as many people.

Under Your Honor's interpretation of this provision, what happens to such equipment?

The Court: Well, of course, Embassy has to be sold as a going concern. If without that equipment it cannot be sold as a going concern, then that is covered by the decree. Suppose, for example, they bought new milking machines, or something of that sort. Of course, that is part of the business.

[fol. 1646] Mr. Bergson: The item that Mr. Saunders is referring to, Your Honor—

Mr. Saunders: I am not referring to any specific one, Your Honor.

Mr. Bergson: An illustration of the item to which he refers is, after we acquired Embassy Dairy, we acquired a machine that did mechanically what was done manually beforehand. This was a vast improvement in the Embassy operation. It is not necessary to the operation of Embassy Dairy, and many of the dairies in town today don't have such a machine.

The Court: Yes.

Mr. Bergson: When I talked to Mr. Saunders about this—

The Court: Well, what is your view of that?

Mr. Bergson: My view is that that would not be covered because we would divest—

The Court: I do not think I should give an advance interpretation, because the situation will be governed by detailed facts existing at the moment. I think it would be rather improvident and perhaps almost injudicial for me to give advance interpretation on a general situation which might depend on specific facts.

Mr. Bergson: If we wanted to dispose of it, we would have to come in and get Your Honor's permission under the decree as you have it now.

The Court: Yes. With the value over $10,000, you would [fol. 1647] have to get the Court's permission.

Mr. Bergson: The chances are ninety-nine out of a hundred that we wouldn't do it anyway.

The Court: For the reason I have stated, I do not believe in drafting decrees, any more than in drafting legislation, it is a desirable thing to go into detail, anticipating possible contingencies, because once you start doing that, then you have the rule of inclusion of one thing is equivalent to exclusion of something else. I am going to leave this.

Mr. Saunders: There is one last matter touching the whole decree, Your Honor.

Your Honor will recall in the course of the last hearing, the Government pressed for a finding not only as to Section 3 but as to Section 1.

Your Honor made a finding only as to Section 3. We assume that Your Honor does not intend to make a finding as to Section 1.

The Court: That is quite correct.

Mr. Saunders: Under those circumstances, our draft, in order to make this a final judgment, had to provide and did provide for disposition of the Section 1 issue. There is nothing in the Defendant's draft that does this.

Our provision VIII (A), Your Honor.

The Court: You know my view is that Sections 1 and 3 are one section.

[fol. 1648] Mr. Bergson: That is the way we construed Your Honor's ruling.

The Court: Now, Congress made a mistake. In 1890, in defining "interstate commerce," it said, commerce between states, and forgot the words, District of Columbia. So later on Section 3 was added which included District of Columbia.

Isn't that what it amounts to?

Mr. Bergson: It was done at the same time, Your Honor.

Mr. Saunders: Done at the same time.

The Court: Was it at the same time?

Mr. Bergson: Yes, sir.

The Court: Very well. It followed a different pattern than later Congresses followed. It split that up in two sections. The two sections should be read together. I do not think they are separate causes of action.

Mr. Saunders: Wouldn't our Paragraph VIII (A) eliminate any question about it, Your Honor?

Mr. Bergson: Not so far as we are concerned, because it states that it is without prejudice, which means you can come back again.

Mr. Saunders: We are providing for dismissal of the cause of action pleaded under Section 1. It has to be gotten out of the case.

The Court: Mr. Bergson, have you any objection if in Paragraph 3 of the proposed decree, in Line 3 thereof, [fol. 1649] where we say, "were and are in violation of Section 3," we say, "Sections 1 and 3"?

Mr. Bergson: I have this problem, Your Honor. If, heaven forbid, the Supreme Court should reverse your decision on Count 1, I would like to have preserved my argument on the interstate commerce point.

The Court: Well now, here is what I am going to do, Mr. Saunders. I have ruled, and I am repeating my ruling that I regard that as only a single cause of action, because I read Sections 1 and 3 together.

Mr. Saunders: In that event, Your Honor, why not a finding as to violation of Section 1? It is a formal matter if Your Honor views them as the same.

The Court: No, I am going to leave it as it is.

Now, gentlemen, I am signing the decree with these interlineations and excisions. Perhaps you might want to make a clean copy. I shall be very glad to sign a clean copy; but in the meantime, the decree is signed.

Now, in order to dispose of everything, and not insist on you coming back later, do you want to apply for a stay?

Mr. Bergson: Yes, Your Honor.

The Court: I take it that the Government is not objecting to a stay?

Mr. Saunders: No, Your Honor.

The Court: Now, I will grant a stay on condition that [fol. 1650] Defendant prosecute its appeal with due diligence, which means, of course, that you have to file your notice of appeal immediately. Notice of appeal is a simple matter.

Mr. Bergson: This goes to the Supreme Court. We have to include a designation of record to go up.

The Court: Yes, but don't you file a notice of appeal beforehand?

Mr. Bergson: No; it is merged.

The Court: Not in a direct appeal. Then you will have to file the jurisdictional statement.

Mr. Bergson: After the record gets up, yes.

The Court: Well, I will make just the general requirement: The stay is granted on condition that the Defendant prosecute its appeal with due deligence.

Of course, I cannot conceive, gentlemen, that it is possible to get the appeal on for argument this spring.

Mr. Bergson: No.

The Court: Because the Supreme Court stops hearing argument early in May.

Mr. Bergson: Even if we were to note our appeal today, Your Honor.

The Court: They have got dates set way in advance. Probably they have got enough cases set for argument even now to finish out the year.

I had a chat with the Solicitor General about a year ago [fol. 1651] in connection with another matter, and he told me by the time the fall comes, there are practically enough cases set for argument to cover the entire term of the Court, so that writs of certiorari that are granted, say,

in November or December would not come up for argument until the following fall. So I suppose this case cannot be argued until the term beginning October 1959.

Now, I think both drafts were very well drawn. I wish all lawyers would do as well as you gentlemen do.

I again wish to thank counsel for both sides for their very able and enlightening presentation of their points of view. It has been a pleasure to have tried this case with you gentlemen.

Mr. Saunders: Thank you.

Mr. Bergson: Thank you very much, Your Honor.

(Whereupon at 11:25 a.m., the hearing was concluded.)

[fol. 1667]

PLAINTIFF'S EXHIBIT 21

(Emblem)

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.
1756 K STREET, NORTHWEST
WASHINGTON 6, D.C.
REPUBLIC 7-6181

J. HOMER REMSBERG, PRESIDENT

B. B. DERRICK, SEC'Y-TREAS.

June 2, 1954

MEMORANDUM TO DIRECTORS—

The attached is a resumé of the talk currently being given at the meetings and which may be of assistance to you in handling the personal contacts with the individual producers. There is sufficient to distribute among the key men in your territory.

You will also find enclosed a supply of promissory notes for your use. The Certificates of Indebtedness will be ready the first of next week and can be issued as of July 1st.

If we, here at the office, can be of any assistance to you in furnishing you with any clerical help or anything else

that you may wish, please call on us. We are at your full disposal.

You may be interested to know that as of this memo, we have had two meetings; one at Warrenton, and one at Culpeper, and the response from the producers, representing better than 60% of the territory, was 100% behind the project.

W. B. HOOPER
WBH:w

[fol. 1668]

RESUMÉ OF EMBASSY DAIRY PURCHASE
For the use of Directors and Team Captains
in connection with producer subscriptions to
Certificates of Indebtedness

I.

Background of Dairy's Impact on the Washington Market.

The Embassy Dairy has for the past 15 years been the major factor involved in the attempts to weaken and destroy the Milk Act of 1925. This dairy has repeatedly devised means and ways of circumventing the Act and has been the prime mover in instituting litigation for that purpose and has had considerable success in having the Regulations modified. The dairy has in the past, and is at the present time, bringing in considerable quantities of milk from other than licensed farms, which milk is being processed and sold in the Washington Metropolitan Area.

In addition to being the leader in the attempts to circumvent and modify the Milk Act and the accompanying Regulations the dairy, through its ability to buy cheap milk both from unlicensed sources and from independent Washington producers, has cut into the market structure to the

extent that they have taken considerable sales away from dealers buying milk through the Association.

II.

Direct Effects Upon Producers

As the result of their ability to under-buy the market and thus take away business from dealers purchasing their milk through the Association they have, as a result, reduced the Association's Class I sales and therefore caused additional surplus to the members of this Association. We estimate that this has amounted to about $700,000 a year loss in revenue to Association producers.

[fol. 1669] The effect upon the producer milk checks has not been limited to this loss of sales, but extends to even a greater amount to the contract milk bidding. There is approximately 14,000 gallons of contract milk a day in this Metropolitan market. This milk would normally be classified as Class I and be sold to the distributors at the Class I price. As the result of the dairy's ability to under-buy, therefore under-cut in their bidding, it has been necessary for the Association to drop the contract price to a competitive level, that is, to the price that Embassy is able to buy their milk. This means that instead of getting approximately $6.62 per cwt. for this milk it has been necessary to drop the price to $3.50 and in some cases lower. The difference between the price at which this milk should have been sold and the price it is necessary to set on it in order to keep it out of surplus by getting the contract bids, has amounted to approximately $1,171,000 a year.

Therefore, in summary, it is easy to see that the action of this dairy is costing the producers of this market very close to two million dollars a year.

III.

What Does the Association Expect to Get Out of the Purchase?

By acquiring this dairy the Association can immediately pick up approximately 8,000 gallons of milk sales for its members for which the dairy has been buying the milk from other than licensed producers on the market. This 8,000 gallons of sales calculated at the class prices would amount to approximately $3.13 per cwt. difference to the membership; that value is the difference between a calculated blend of the class prices of $5.53 (70% Class I, 30% Class II) and the price now being received for that milk of $2.40 (Class III or surplus price) and amounts to about [fol. 1670] $675,000 a year. In addition to this the producers on the market will immediately benefit to the extent of the full price on contract milk which has been pointed out above. Therefore, the Association can expect, as a minimum, to pick up approximately two million dollars a year for its members which will amount to an increase of about 30¢ per cwt. on the blend price.

Even under the most unfavorable conditions, assuming that there was some other competitive factor that would force the contract pricing down so that only 50% of the full difference was realized, there would still be approximately a million dollars left in actual benefits to producers or a minimum of 15¢ per cwt. increase in the milk check.

IV.

Deferred Benefits as the Result of Acquisition of the Dairy

In addition to the immediate benefits referred to above, the Association will also have the benefit of the class prices on all milk going into the dairy which at the present time amounts to 20,000 gallons per day, but for the purpose of actual calculation we will assume benefits only on 12,000 gallons, which is the difference between their 20,000 gallons of sales and the 8,000 gallons which they are currently

importing from other than licensed sources and which we have included in the direct benefits to producers in the previous discussion. We will also assume for the purpose of using the most conservative factor that the dairy will only retain 12,000 gallons of sales from its 20,000 and that the 8,000 gallons will be distributed among the other dairies on the market and which are included in the benefits enumerated previously as being immediately available to producers in their milk check. Mr. Ward has stated that [fol. 1671] he will, and he is at the present time, making arrangements to move all of the producers now shipping to him independently to his plants in adjacent markets. This means that there will be an additional 12,000 gallons of milk moved out of Association member surplus to class pricing at the dairy. There will be, in that event, the additional income represented by the difference between the manufacturing price and the dairy blend. This will represent approximately one million dollars per year. In addition to that, if the dairy retains 12,000 gallons of sales on its own, it is reasonable to expect that it will make, after payment of all expenses including interest on funds borrowed, about $200,000 a year profit. This money will not be paid back to producers immediately but will be retained for the purpose of paying off the debt incurred by the purchase of the dairy.

V.

How Do We Raise the Money to Buy This Dairy?

The purchase price of the dairy is $2,940,000 for the fixed assets, that is, land, building, equipment and good will, plus the actual audited values of the revolving inventory and the accounts receivable which will amount to about $700,000. This means a total cash outlay of about $3,700,000. In addition to that, the Association should have a minimum working capital of $300,000 so that it is necessary to raise four million dollars to complete the acquisition.

In buying this the Association is acquiring assets as follows according to the appraised values: Land and building $1,022,000; equipment, trucks, etc. $1,319,770; total

$2,341,770, for which we are paying $2,940,000, leaving $598,230 for good will. In this good will we are purchasing all rights to the sales of the Embassy Dairy, trade marks, trade names, and an agreement drawn up by our attorneys [fol. 1672] which will keep Ward, his family, and any corporations present or future in which he is interested, from selling milk in the Metropolitan Washington area for a period of ten years. We are advised by our attorneys that this is a valid and binding contract and any violation of it is grounds for a suit by the Association. This contract prevents Mr. Ward from doing business in our area for a period of 10 years. That means that we are only paying about $59,000 per year to keep Ward out of our market, against which we have known benefits of two million dollars per year immediately payable to producers, and deferred which will go toward the purchase of the dairy of another million, two hundred thousand dollars per year. As we analyze the figures, the price being paid is not out of line.

The nature of the accounts receivable and inventory which have to be purchased in addition is merely a turnover and represents current operational money and therefore cannot rightly be considered as part of the purchase price.

The Board of Directors proposes to raise the necessary funds to consummate this purchase as follows:

1. By borrowing from the Baltimore Bank for Cooperatives a sum of two million dollars which will be repayable over an 8-year period. The interest on the total loan will be about 4%. This loan is to be broken up into two parts; one which will be a so-called facility loan based on the assets of the dairy and the Association; the other part an operational loan which is based on current assets such as accounts receivable, revolving inventory, etc. These two loans carry different rates of interest but the average will work out to about 4%.

2. The Board expects to raise, and have been given assurance to that effect, not less than $500,000 from the [fol. 1673] local banks in the production area. There has

been a meeting of 15 of these banks at the Association office within the past 10 days and at which time each bank assured the Association Management and members of the Board of Directors which were present, that they would back this venture 100% and would subscribe to the full limit of their legal ability to do so. To these local banks the Association will give its promissory note for the amount of money it borrows. These notes will bear 5% interest and will run for 3 years and will be paid off in 12 quarterly equal payments. In order to expedite the handling and increase the efficiency of the transaction, instead of having individual notes for each bank the Association will sign one note for the full amount and handle it through a servicing bank, who in turn will make distribution to the various participating banks. This note or notes, will be secondary insofar as collateral guarantee is concerned to the Bank of Cooperatives and is based almost solely on the recognized ability of the Association to make its payments and to earn sufficient money to retire the indebtedness. The income previously outlined will be more than sufficient to guarantee that payment.

3. The balance of financing must come from the producers. To do this the Association, through its Directors, will offer to the membership Certificates of Indebtedness bearing 5% interest from the date of issue, the date of said issue to be July 1 and January 1. These Certificates will have a minimum maturity date of 5 years, a maximum redeemable date of 12 years. The Certificate will be fully negotiable and will be guaranteed by the ability of the Association to pay. These Certificates may be purchased either by payment in full by cash, or by the producers signing a promissory note for the amount of their subscription, which note will authorize the Association to make deductions from the milk check over a period of not [fol. 1674] more than 24 months which will be applied against the purchase of the Certificates. As soon as the full amount has been paid in, the note will be returned to the producer together with his Certificate of Indebtedness, at which time it will begin bearing interest. As a goal for the producer subscription the Association is

asking each and every member to subscribe not less than 5% of his last year's gross milk check. This would bring approximately $1,750,000.

The Association's Directors and Management are quite confident that the producers will not only meet the minimum but will oversubscribe. This means that the Association will not have to deplete its present working capital in order to complete the purchase. This is important.

The time element involved in this transaction is most important, inasmuch as this must be completed not later than July 31st and it is hoped in order to secure all the benefits that it can be done by July 1st. It is important that each and every person involved, work on this unceasingly and without any delays until we have reached our full goal. The Association has put up guarantees of $200,000 in this purchase which will be forfeited if we are unable to complete the necessary financial arrangements within the prescribed time limits.

VI.

Method of Retirement of Indebtedness.

The indebtedness incurred in this purchase will be paid off by a combination of methods.

1. By eliminating payment in cash of Unexpended Brokerage Refunds until such time as the bank indebtedness is paid off and applying those refunds to the retirement of the indebtedness. This does not mean, of course, that any producer whose refund is temporarily held up will lose that money. It simply means that instead of receiving [fol. 1675] his refund in cash at the end of 6 years it may be 10 or 12 years before it is received. However, he will still maintain his full equity in the Association's assets and his share will be recorded on the books and he will receive that amount in cash as soon as the indebtedness is retired.

2. By utilizing the profits from the operation of the dairy; that is, the normal profits that the dairy might make as the result of its sales and other operations. The producer will receive credit proportionately in this sum and

it will be set aside in equity to him. The producer will be notified each year of the amount of that equity in the regular Letter of Advice so that he will at all times know the amount of money which has been set aside in his name but which will be used for the retirement of indebtedness. Again, as in the case of the Unexpended Brokerage, these sums will begin to be revolved out and paid in cash to the producer as soon as the indebtedness is retired.

3. In addition to the above, all profits or benefits resulting from the sale of milk directly through the dairy, over and above that which would have been received by the producer if this purchase had not been made and the milk had gone into surplus, will be applied to the reduction of the debt instead of being applied to the blend price. This does not mean any reduction in the immediate benefits referred to in the first part of this memorandum, that is the 15 or 30 cent increase in the blend price, but only the funds that would result from the milk going through the dairy itself, that is, the approximately one million dollars we referred to with respect to the 12,000 gallons of sales that we expect to handle through the dairy. Again, as in the case of Unexpended Brokerage and the dairy sales profits, this money will be credited to the individual producer's account in proportion to the milk that he ships and [fol. 1676] of course that means all producers, not just those who will ship through that plant; and again, they will be notified of the amount set aside in their name and when the debts are retired this money will revolve out the same as all other money and ultimately given back to the producer in the form of cash.

There will be no interest paid on these funds. The only interest involved is on the actual Certificates of Indebtedness.

Conclusion

In summing up the benefits and other factors, it is the considered judgment of the Board of Directors, the Management, and all other parties to whom this plan has been submitted, that the purchase is sound, the method of financing is sound, and that it is good business to make

this purchase. It will bring immediate benefits in a considerable sum to the producers of the market; it will tend to make the market a better market and a sounder market; it will remove an irritant and a menace to your Health Regulations and to the stability of your market; it will protect your investments, besides giving you a very good return.

Your subscription to the Certificates only amounts to about 12 cents per cwt. on your milk for 2 years, or about 2% of your capital investment. The immediate cash benefits will be at least 15 cents per cwt., so that even after deducting the amount of your subscription, which is not a contribution, but a sound business investment, you are ahead in so far as your actual cash position.

From the above it is very easy to be seen that even allowing a 50% margin for unknown conditions and contingencies that the Association will be able to retire its indebtedness without calling upon producers for other than the initial [fol. 1677] financing in about 5 years. It is certainly well worth the while of every producer to make what sacrifice necessary at the present time to safeguard his farm, his future, and that of his children, by backing up the judgment of your Baord of Directors and Management and oversubscribing the amount of money needed. I might point out also in closing that the unanimous support of the producers will have a very salutary effect upon the distributors in the market so that they will know that the Association has the 100% backing of its membership in maintaining the Washington market at its present good standing. It might also be of interest to point out that the Association's action in making this purchase has the unqualified support of the dealers in the market and they have given full assurance that they will work 100% with the Association the same as they have in the past.

W. B. Hooper

[fol. 1678]

PLAINTIFF'S EXHIBIT 22

May 5, 1954

MEMORANDUM

The Maryland and Virginia Milk Producers Association, Incorporated, is a dairy farm cooperative organized in 1920 under the General Corporation Law of the State of Maryland, without capital stock. In October 1923 the corporation converted to a cooperative association, under Section 469(b) of the Cooperative Association Law of Maryland. The Association operates under the Capper-Volstead Act (Public Law No. 146, approved February 18, 1922, 67th Congress) which permits persons engaged in the production of agricultural products to act together in associations for the mutual benefit of all members. Under the General Corporation Law of Maryland a corporation obtains all the powers specified in that Law without enumeration thereof in its Certificate of Incorporation and the Maryland Cooperative Association Law does not restrict the powers of cooperatives granted by the General Corporation Law. It is not uncommon for cooperatives throughout the United States to operate retail dairies; the Dairymen's League of New York, largest milk cooperative in the country, is a similar example. Also the Queen City Cooperative of Cumberland, Maryland, operates a retail dairy.

The Association was formed for the purpose of promoting and encouraging the production and marketing of dairy products, to expand marketing facilities, to protect producers from loss of markets and money from unscrupulous distributors and in general to give producers a more active role in disposing of their agricultural products.

As of April 1, 1954, 1,926 farmers were members of the Association. These 1,926 farmers were shipping approximately 208,000 gallons of milk daily which is better than 90% of the entire Metropolitan Washington milk supply. The average farmer markets in excess of 100 gallons of milk daily. With the exception of the large commercial dry-lot feeders in the Los Angeles Area, Maryland and Virginia producers have the largest average shipments in the United States.

The volume of milk produced by members of the Association has grown steadily since 1939. Over that period, the volume of milk handled annually has increased 175%. This growth parallels somewhat the population growth of Metropolitan Washington. The volume of milk produced annually since 1939 is as follows (figures are in average gallons per day):

Annual Milk Production of Members

1939	68,950	1947	124,736
1940	76,910	1948	128,214
1941	92,518	1949	141,594
1942	101,461	1950	152,181
1943	97,431	1951	161,055
1944	101,477	1952	168,938
1945	109,336	1953	190,004
1946	113,124		

The money the cooperative needs for day to day operations it gets by deducting from members' milk checks one-cent [fol. 1679] per gallon brokerage, which is put into a revolving reserve fund. The unused brokerage (above operational costs) paid in any given year is returned 6 years later and so on from year to year. Although under the law it can do so, the Association does not now own or operate any plants for the receiving or the manufacture of dairy products. It acts as a bargaining agent for its members; markets the members' milk; and collects for the sale of that milk. The brokerage collected during the last 10 years is as follows:

Brokerage Collected

1944	$338,883.96
1945	362,217.90
1946	371,002.59
1947	408,614.83
1948	419,922.13
1949	462,052.14
1950	493,860.30
1951	520,980.44
1952	542,419.38
1953	628,438.35

It is estimated that in 10 years the present population of 1,650,000 of the Metropolitan Area served by this cooperative will increase to in excess of 2 million people. In that event the local supply of milk would increase in proportion and the pattern shown by the above table, 1944-1953, should be substantially repeated.

The Association's customers are the large retail dairies in the Washington Metropolitan Area. However, from time to time it happens that these dairies do not absorb the entire amount of milk delivered by the members. In this event the Association undertakes to sell this excess in other markets. This excess is a normal incident to the operation of the cooperative, the reason being that in order to be sure of an adequate supply it must maintain an excess over and above past average requirements. The D.C. Government advocates an excess of 12 to 15 per cent. The average return to the producer for all milk shipped by him (called the blend price) is as follows:

	Average Blend Price (per hundredweight)
1944	$4.33
1945	4.33
1946	5.12
1947	5.77
1948	6.15
1949	5.54
1950	5.37
1951	6.06
1952	6.37
1953	5.87

We believe that the net return to the members is superior to that in any other market, costs of production being taken into consideration. Our statistics also show that the spread between the price paid the producer and the price [fol. 1680] at which the distributor sells to the public is

less than anywhere in the United States. This shows that the Association's operations are economically sound both in respect of its producers and in respect of the public.

The benefits expected from the acquisition of Embassy Dairy are as follows:

1) Elimination of bootlegging, i.e., bringing in cheap uninspected "distress" milk from other markets. We do not necessarily claim that this milk is sold as D.C.-inspected milk here in the District; however, even the processing of this milk for sale outside the District is detrimental to the Association as it drains off a demand for our own milk. It is estimated around 6,000 gallons a day of this so-called "bootleg" milk is brought into the District and every gallon of it competes with our own milk in one way or another.

2) The elimination of this "bootleg" milk will allow our own milk to replace it, to the great increase of the blend price. This increase is estimated at around 15¢ per hundredweight on all milk.

3) Increase of brokerage fees: Any increase in volume means an increase in brokerage fees and that much additional working capital.

4) Increase in members estimated at 60 to 70 new producers (now selling to Embassy). These new members will increase the Association's revenue from 60 to 75 dollars per day.

Embassy Dairy does between 8 and 9 million dollars annual business, which business the Association will get and in large part retain. Assuming however it loses some of this business, it will lose it to other local dairies who buy from the Association and so the Association would retain the sale of this milk. Insofar as the volume of milk handled by the Association for its members, the acquisition of Embassy will increase this volume by about 18,000 gallons per day, or around 3½ million dollars per year.

The purchase of Embassy Dairy will eliminate a disturbing influence which has been a thorn in the side of the Association for many years, which the local Health authorities apparently have been unable to control. Acquisition of Embassy Dairy cannot be other than helpful and profitable to the Association.

The Association would be happy to furnish any additional information desired with the understanding, of course, that along with the contents of the present memorandum it will be kept entirely confidential.

[fol. 1681] PLAINTIFF'S EXHIBIT 24

BALTIMORE BANK FOR COOPERATIVES

Memorandum

April 16, 1954

PLEASE INITIAL:

S.M.T.	*SMT*
E.F.E.	*EFE*
J.B.J.	√
R.B.J.	*RBJ*
J.R.C.	*JRC*
J.P.M.	*JPM*
F.L.V.	*FLV*
L.N.C.	*LNC*
J.J.G.	*JG*

Re: Maryland & Virginia Milk Producers Association
Washington, D.C.

On this date R. B. Jones, Jr. and I attended a meeting of the Board of Directors of Shen-Valley Meat Packers, Incorporated. Mr. T. T. Curtis of Orange, Virginia, is a member of that board and of several other boards of directors, including that of Maryland & Virginia Milk Producers Association.

During the lunch hour at the meat plant Mr. Curtis told us that Maryland & Virginia has under consideration the advisability of purchasing and operating the milk processing and distributing facilities of Embassy Dairy, Inc., which

is located in the 1600 block of First Street, N.W., Washington, D.C. He stated that Embassy had never cooperated with Maryland & Virginia Milk Producers and had always looked to other sources of supply, and that its policies and practices over the years had not been in the best interests of the dairymen in the Washington milk shed.

It seems that Embassy has indicated a willingness to sell its physical facilities for the sum of $2,500,000, which is generally considered to be about $1,000,000 in excess of their physical value. Other assets of upwards of $1,000,000 would also be involved in the deal (receivables, inventories, etc), meaning that the total sum involved in the deal would be between $3,000,000 and $3,500,000. There seems to be some thinking to the effect that the cooperative would be warranted in paying an extra million over the physical value of these properties in order to get control of them. The present thinking is that the cooperative would operate the plant and absorb the profit or loss in that operation ~~as a factor~~ in ~~determining~~ the blend prices for all milk marketed by the cooperative in the Washington area. At present about 90 percent of the milk distributed in the Washington area is controlled by the cooperative.

Mr. Curtis stated that management had been authorized by the board of directors to investigate the feasibility of acquiring these properties as well as ways and means of financing such acquisition. He said that either Mr. Derrick or Mr. Hooper would probably contact us in this matter right away and that they had also been authorized to discuss financing with the Reconstruction Finance Corporation and with commercial banks. I told Mr. Curtis that we would be glad to discuss the matter with them.

/s/ Jno. B. Jones
Jno. B. Jones, Secretary

JBJ:DB

P.S. Mr. Derrick telephoned the Bank on April 19 and arranged for an appointment in the office of the Bank on Friday, April 23, at 9:30 A.M. JBJ

[fol. 1682]

PLAINTIFF'S EXHIBIT 25

BALTIMORE BANK FOR COOPERATIVES

Memorandum of Conference

April 23, 1954

PLEASE INITIAL:

S.M.T.	*SMT*
E.F.E.	*EFE*
J.B.J.	√
R.B.J.	*RBJ*
J.R.C.	*JRC*
J.P.M.	*JPM*
F.L.V.	*FLV*
L.N.C.	*LNC*
J.J.G.	*JG*

Re: Maryland and Virginia Milk Producers Association, Inc.
1756 K Street, N.W.
Washington 6, D.C.

Reference is made to memorandum of April 16, 1954, covering a conversation on that date with Mr. T. T. Curtis, Orange, Virginia, who is a director and member of the Finance Committee of the board of directors of the above Association.

Messrs. B. B. Derrick, Secretary-Treasurer, and W. B. Hooper, Assistant Secretary, conferred with the following representatives of the Bank in Mr. Thomson's office on this date: Messrs. Thomson, R. B. Jones, Jr., Cobb, ~~Markey~~, and the undersigned.

Background of and reasons for the proposal to acquire Embassy Dairy, Inc. are summarized briefly as follows:

(1) The Association controls or supplies 90 percent of the District of Columbia fluid milk market, and 45 to 50 percent of the suburban market in the Washington metropolitan area (from a line from Laurel and Gaithersburg on the north to Culpeper on the south).

(2) The Association supplies all Washington Dairies except Embassy, which has always looked to other sources for its milk supply.

(3) Embassy procures cheap milk from outside the Washington area and is a disrupting or unstable factor in the market. The plant handles 18/20,000 gallons daily (plant capacity 40,000 gallons), of which 40 percent is retailed and 60 percent sold to choice wholesale accounts. They are also successful as bidders for sizeable volume of fluid milk procured on bids. About 70 percent of its volume is Class 1, 30 percent Class 2.

(4) The Association seems convinced that the Embassy operation costs its members a sizeable sum of money each year, one way or another (variously estimated from one to two million dollars) (seems incredible, on the surface) (one million dollars would represent about 1½ cents per gallon on the 1953 volume of the Association).

(5) Two alternatives to eliminate such disrupting tactics are: Acquire ownership of the business, or ask for a Federal Order in the Washington Market.

Preferring to purchase Embassy, if practicable, the Association has discussed such possibility with Mr. Ward, principal owner. It appears that Mr. Ward is willing to sell on the following conditions:

(1) That Embassy realize the sum of $2,500,000 for all of its fixed assets over and above a mortgage debt of $440,000 to Equitable Trust (which debt is subject to 3 percent penalty for prepayment).

[fol. 1683] (2) That inventories, receivables, and other current assets be acquired at audit values (probably $700,000).

(3) The present owners would agree to stay out of the milk business in metropolitan Washington (Ward is the principal owner of Greenspring Dairy, Baltimore, and of another plant on the Eastern Shore of Maryland).

The Embassy plant is reported to be modern—one of the best equipped in Washington. Depreciated value of fixed assets is reported to be around $1,600,000. The Association figures it would be paying a premium of around a million dollars (possibly more) for the good will of the business and the value of acquiring the facilities for its own operating purposes. In the event of purchase, this plant would be operated by the Association as a permanent part of its program, and as a yardstick for measuring the efficiency and operating results of other plants being supplied by the Association. This sales outlet, plus present outlets, would afford the Association about 98 percent of the Washington market.

With purchase in mind, the Association is considering the following:

(1) Present Embassy personnel, except for top management, but including the plant superintendent, would be retained. Key positions suitably staffed, and employee relations good. An experienced, capable general manager is in mind and available, at substantially less cost than present management. No names divulged, as yet.

(2) Association management believes the property could be paid for in five years from operating margins above blend prices, plus a net capital retain of 6 cents per hundredweight on all milk handled by the Association in the Washington market (estimated $300,000 per annum), plus $200,000 or more per annum that would be

available from its present brokerage revolving fund. Opinion expressed that ownership of this plant by the Association would improve the blend price by 15 cents per hundredweight.

(3) Embassy is believed to be earning $700,000 or more per annum, before taxes, but *after* high top-level salaries which the Association could reduce by at least $100,000 without sacrificing efficiency. Association wouldn't expect to earn that much, because all milk would be charged into the operation at blend prices.

Association financial reports for the past three years were reviewed briefly (printed copies left for our file). After ascertaining that the Bank could not lend the entire amount needed to acquire this business ($3,500,000 to $4,000,000), and probably not more than $1,500,000 to $2,000,000, there was some discussion of other possible sources of funds.

The conference ended with the understanding that:

(1) The Bank will give some more thought to the proposal and possibly discuss it with the central office, after which

(2) A joint conference may be arranged for a further discussion (BBC, central office, Association).

[fol. 1684] (3) Meanwhile, Mr. Hooper will forward for our review and files certified copies of articles, bylaws, and marketing agreement.

/s/ JNO. B. JONES
Jno. B. Jones, Secretary

JBJ:DB

Association office Phone: REpublic 7-6181.

[fol. 1685]

PLAINTIFF'S EXHIBIT 26

BALTIMORE BANK FOR COOPERATIVES

Memorandum of Conferences

May 17, 1954

PLEASE INITIAL:

S.M.T.	*SMT*
E.F.E.	*EFE*
J.B.J.	√
R.B.J.	*RBJ*
J.R.C.	*JRC*
J.P.M.	*JPM*
F.L.V.	*FLV*
L.N.C.	*LNC*
J.J.G.	*JG*

Re: Maryland and Virginia Milk Producers Association
Washington, D.C.

To bring this file up to date: Mr. Hooper telephoned the undersigned on May 13 to let us know that negotiations with Embassy Dairy were proceeding satisfactorily, and wanted to know whether or not it would be physically possible to close a loan by July 1 in the event the Association decided to apply for such a loan and the Bank saw fit to approve it. He pointed out that Embassy was desirous of consummating the deal by that date if it is to be consummated. I replied that we should be able to process the loan application and, if approved, close a loan by that date if:

(1) The loan application and supporting exhibits, including financial statements, operating statements, and appraisal data on Embassy were made immediately available to us;

(2) Funds required to finance the purchase, over and above that advanced by the Bank, were available on a basis acceptable to all concerned; and

(3) There were no delays in getting good title to the property.

Mr. Hooper assured me there would be no delay with respect to item (1). With respect to item (2) he said that in view of prior conversations with representatives of the Bank he believed the Association could qualify for loans of $2,200,000 (facility and operating capital); that the Association can immediately supply $1,000,000 in cash from its present resources (cash in bank and Government bonds); and that the remainder could be borrowed on an unsecured basis from a pool of country banks. With respect to item (3), burden of compliance by July 1 would be on Embassy.

Mr. Hooper stated that the proposal would be further considered by the board of the Association at a meeting on May 15, and that if a decision were made to proceed with the purchase, subject to acceptable financial arrangements, he would be in to see us. Recognizing that time is of the essence, a tentative date was made for a conference at 10 A.M. on May 17. Not knowing the attitude of the Bank with respect to the amount or character of financing mentioned by Mr. Hooper, I did not pursue the matter with him on the phone, preferring to discuss it at the proposed conference on May 17.

Messrs. Derrick and Hooper came to the office of the Bank at 10 A.M. on May 17. At this conference the Bank was represented by Messrs. Thomson, R. B. Jones, Jr., E. F. Ebert, and the undersigned.

At this conference it developed that the total amount involved should be about as follows:

[fol. 1686]

Net sum to Embassy in payment for all fixed assets, good will, etc.	$2,500,000
Mortgage debt to be paid or assumed by Association	440,000
Accounts receivable (to be acquired at audit value)	500,000
Inventories (to be acquired at audit value)	200,000

Total to Embassy	$3,640,000
Plus:	
Working capital requirements	360,000
Total	$4,000,000

We were advised that the net book value of fixed assets to be acquired would be somewhere between $1,400,000 and $1,500,000 as of March 31, 1954. The opinion was expressed that such value is substantially below fair appraised value (replacement cost, less depreciation). Basis present net book value of $1,400,000, the indicated cost of good will would be $1,540,000. Embassy is reported to be earning $700,000 to $800,000 per annum—before Federal income taxes, but after heavy salaries for the principal owners (estimated to be at least $100,000 more than the Association would have to pay for proved management).

We were also informed that Embassy would be willing to finance on the security of the Association's note as much as $1,000,000—$500,000 payable within one year and as much as $500,000 payable over a period of three to four years.

There followed a discussion of the immediate need for additional capital if this proposal is to be consummated—probably $1,000,000 additional. We were informed that of the present brokerage retain of 11.6 cents per hundredweight (the only and the maximum retain for which provision is made in the present membership marketing agreements), about 5 cents is required to defray the cost of operating the Association, and the remainder is being retained as allocated capital reserves. The Association is a non-stock concern. This reserve fund is now being revolved on a 6-year basis (discretionary). The balance in the reserve at December 31, 1953, was $1,361,175—varying from $207,374 to $251,372 per annum.

The Association has under consideration a proposal to increase its capital retains to 20 cents per hundredweight—to cover operating costs (now about 5 cents), 2 cents for advertising, and the remainder for capital (allocated re-

serves). This proposal was tested at a recent meeting of members in the Manassas area and received unanimous support. Management believes similar support will be forthcoming from the entire membership.

A net retain of 13 cents per hundredweight, basis the 1953 volume, would supply better than $2,000 per day, or $730,000 per annum. Mr. Hooper believes that the Embassy plant can be depended upon to earn the Association $250,000 per annum above blend prices (based on a volume of 12,000 gallons daily, as compared with the present 18,000 to 20,000 gallons daily, meaning that some 8,000 gallons of the present volume being marketed under bid contracts, etc. may be directed to other distributors being supplied by the Association). These two sources of new capital would amount to almost a million dollars per annum.

[fol. 1687] Also discussed was the advisability of amending bylaws and marketing agreements for the purpose of specifically recognizing the ownership and operation of a bottling plant as a part of the Association's overall program of marketing fluid milk (which in the past has been confined principally to price bargaining, assembling, delivering, and blending or pooling of prices), and of making specific provision for the additional retains which are being proposed. Such amendments, while not required to proceed with the proposed purchase or to establish eligibility to borrow from the Bank, seem to be advisable and will require some time to consummate.

Meanwhile, some way needs to be found to finance the proposed purchase—that is, the difference between the $4,000,000 involved and what the Association now has available ($1,000,000) and what the Bank can lend (possibly as much as $2,000,000).

At this point, Mr. Thomson telephoned Director J. D. Lawrence and arranged a conference in the latter's office at 3 P.M. on this date. Present at this conference were: (1) For the Association—Messrs. Derrick and Hooper, and Col. Hughes, the Association's Attorney; (2) For the Director's Office—Messrs. Lawrence, Viehmann, and McConnell; (3) For the Bank—Messrs. Thomson, R. B. Jones, Jr.,

Attorney Ebert, and the undersigned. Also present during a portion of the conference was Mr. Donald Hirsch of Farmer Cooperative Service, USDA (dairy specialist).

During this conference the entire proposal was again reviewed and discussed, after which representatives of the Association expressed the opinion that $500,000 could be borrowed from members by July 1 (on the security of notes or certificates of indebtedness for the issuance of which the Association needs no additional authority). This would mean that at the time of purchase the Association would have at least $2,000,000 available ($1,000,000 cash capital, plus $500,000 borrowed from members, plus $500,000 in term credit available from Embassy) towards consummating the deal, plus such amount as the Bank may be willing to advance. An additional $500,000 would be obtained from members as rapidly as possible, to eliminate any remaining debt to Embassy.

Representatives of the Association also agreed to supply the Bank immediately with financial and operating data on Embassy Dairy, and within a week to supply copy of an appraisal report which it is to have made for its own benefit by a Washington appraisal firm. When this information is available the Bank will review it and again confer with representatives of the Association.

/s/ Jno. B. Jones
Jno. B. Jones, Secretary

JBJ:DB

P.S. (1) The Association is being asked to post $100,000 to bind the option to purchase. They want to be reasonably sure of their financial commitments before posting this sum.

(2) Messrs. Derrick and Hooper assure us that the proposal to purchase and operate the Embassy plant is known to the other milk distributors in Washington and has met with no objection from those quarters.

[fol. 1688]

PLAINTIFF'S EXHIBIT 27

BALTIMORE BANK FOR COOPERATIVES

SECRETARY'S REPORT

June 8, 1954

To: Executive Committee
From: Jno. B. Jones, Secretary

Applicant: Maryland and Virginia Milk Producers Association, Incorporated, Washington 6, D.C. Application No. 1429, dated June 1, 1954, for $3,000,000

The Association has not previously applied to the Bank.

I. HISTORY:

A. *The Need for Cooperative Effort.* As has been the case with most successful organizations of this type, the organization of the milk producers in the Washington market resulted from the existence of a definite and pronounced economic need—in this instance arising from:

1. Market insecurity—for the producer and for the distributor.
2. Needless price fluctuations—again, to the detriment of both the producer and the distributor.
3. Mal-distribution of surplus milk—to the disadvantage of the producer and the distributor.
4. Complete lack of bargaining power on the part of the producers.
5. Generally chaotic conditions in the production and distribution of fluid milk for which there was a steadily increasing and stable demand in the Washington Metropolitan area.

Such conditions, of course, are not conducive to the investment, labor, know-how, and business

risks involved in the production of a dependable supply of high quality milk—and, therefore, are not in the best interests of the producer, the distributor, or the consumer.

B. *A First Attempt at Organization.* In 1904, the "Milk Producers' Association of Maryland, Virginia and District of Columbia" was incorporated under the laws of the District of Columbia. This was purely a bargaining association; fairly successful at first in strengthening the price level through conferences with distributors. While some members were radically inclined and advocated strikes, the conservative element was in the majority, and strikes were avoided. The Association did not charge any brokerage fee nor accept any responsibility for members' milk. It was merely a bargaining club, lacking in effective bargaining power as it had no financial resources. This experience doubtless paved the way for what was to follow, and the urge for a more effective association resulted in the formation of

C. *The Subject Association.* An Association booklet, published in 1944, gives the following interesting summary of its history to that date (following the comments on its predecessor):

[fol. 1689] "It was not until 16 years later that a strong and effective Association was formed. On September 21, 1920, the Maryland and Virginia Milk Producers' Association, Inc., was incorporated as a non-profit corporation under the general corporation laws of Maryland. On October 5, 1923, the organization was converted into a cooperative Association under the cooperative laws of Maryland. The purpose of this Association as given in the articles of incorporation were:

"1. To encourage better and more economical methods in producing dairy products.

"2. To secure better results in marketing and advertising our products.

"3. To develop our markets and find new ones for our products.

"4. To buy supplies in a cooperative way.

"5. To rent, buy, own, sell and control such property as may be needed in the business.

"6. To own, lease, and operate storage and packing warehouses.

"7. To arrange for the transportation and handling of our products in the best possible manner.

"8. To cultivate a cooperative spirit among dairymen.

"9. To perform any other work which may tend to the betterment of the members and the promotion of our industry.

"From such a list of objectives, it is evident that the dairymen had formed this new organization to be considerably more than a bargaining job. The Association employed a manager and signed up a large number of producers on a membership contract. The brokerage fee at first was one-fifth of a cent per gallon. On July 1, 1921, this fee was raised to one cent per gallon. The Association borrowed $45,000.00 from its members by issuing certificates of indebtedness and began operating a surplus plant in August 7, 1921. A month after this plant opened, the dealers called a strike—the first and only one in 23 years of marketing. Members were instructed to withhold one-third of their supply from the fluid market in order to force the dealers to pay a higher price. The dealers retaliated and refused to accept any milk from members which threw virtually all the members' milk into the Association's surplus plant. At the end of three weeks, the Association

could no longer stand the financial losses and notified its members shipping to the plant that the Association could not accept the responsibility for their milk and that it was necessary for them to try to place their milk with the dealers.

"This was a body blow to the new and struggling organization as many members withdrew and refused to support the Association.

[fol. 1690] "Undoubtedly the early founders realized they did not have sufficient volume and proceeded to do something about it. Early in 1922, the Association began re-signing producers on a pooling contract that was not to become binding until enough producers had signed to control at at least 85 per cent of the market's milk supply. In order to be able to take care of the milk if dealers refused to cooperate, the Association built a plant in Frederick, Maryland. By September 1923, this plant was ready and on October 1, 1923, enough producers had signed the pooling contract to make it effective.

"Some dealers refused to accept members' milk under the new set-up and that milk was diverted to the Association's plants at Frederick and in Washington. This time the Association weathered the storm because they had sufficient volume and the contracts with members were binding. However, the financial strain was heavy from handling the milk the dealers would not take. By July 31, 1924, the Association's indebtedness was over $108,000.00. To help carry these losses the brokerage fee had been raised to four cents per gallon. On October 1, 1924, the brokerage was reduced to three cents per gallon and on October 1, 1925, it was reduced to two cents. On October 1, 1926, a new producer contract became effective in which the brokerage was limited to one cent per gallon. It has been one cent ever since. (It is only one-half a cent for members delivering to receiving stations).

"On April 1, 1927, the Association's two surplus plants were closed because the Association was able to make satisfactory arrangements for the handling of surplus with the dealers. Later the Association sold the plant at Frederick and surrendered the lease on the Washington plant selling the equipment. Since that time, the Association has not owned or operated any surplus plants."

(following quote from January, 1938, booklet) "After the closing of the surplus plants, the Association grew rapidly and with direction, but it was not until 1931 that the Association had really reached a secure and formidable place in the market. By December 31, 1930, the Association had a reserve fund of over $271,000.00 compared with a deficit of over $108,000.00 as of July 31, 1924."

(again quoting from 1944 booklet) "By December 31, 1935, the Association had a reserve fund of over $435,000.00. **** The reserve fund on July 31, 1944 was $1,147,189.28. The total volume of milk handled by the Association grew from 8,551,857 gallons in 1924 to 22,036,646 gallons in 1932 and 40,702,975 gallons in 1943. Since 1931, Association members have supplied between 85 and 90 per cent of Washington's milk supply."

It appears that as the years have gone by, the Association has increasingly endeavored, with very good results, to accomplish the objectives and purposes enumerated in its articles of incorporation. Among the tangible services rendered by the Association are:

[fol. 1691] 1. Maintenance of a sound price level:

> Now the members have just one salesman—the Association. By positive persuasion backed by the loyalty of its members (under firm marketing agreements) and by economic

facts, the Association has been successful in this endeavor. The policy has been to keep price objectives in line with economic conditions, with no attempt to force prices up when not justified by supply and demand conditions.

2. Guarantee of ultimate payment for milk.

   Acting as agent for its members the Association guarantees full payment for all marketable milk delivered by all members at all times and under any and all conditions. This guarantee has never failed and is backed up by a reserve fund of over one million dollars.

3. Guarantee of a market for all milk.

   This has never failed—for all marketable milk.

4. Checking weights and butterfat tests.

   This service has been of real value to the producers.

5. Maintenance of an effective field force.

   To keep in close touch with all members in the interest of more efficient production of high quality milk, and to keep them informed of the Association's activities.

6. Purchasing supplies and equipment.

   Principally dairy barn equipment and supplies procured by the Association and distributed through its supply warehouse at Frederick, Maryland.

7. Direct payment for milk.

   Since February 1935, the Association has collected all sales proceeds and calculated the blend prices and monthly accounts and paid the members from its own office.

8. Handling surplus.

The Association does not own a surplus plant, but it does sell and accept as agent for its members the responsibility for all the milk or cream the dealers do not want for fluid use.

9. Regulating supplies of milk from farms to dealers.

To regulate the supply among dealers and to facilitate delivery, etc.

[fol. 1692] 10. Hauling milk to market.

The Association does not own trucks or have contracts with the transportation companies that haul members' milk from the farm to city, but is very active in facilitating hauling arrangements and increasing hauling efficiency.

11. Dissemination of news and information.

A good job—both marketwise and on Association's activities.

12. Representation of members, as dairymen, before governmental and other bodies.

Again—an aggressive and effective job being done.

13. Cooperation with other farm organizations, such as National Cooperative Milk Producers' Federation, National Council of Farmer Cooperatives, etc.

That the above program of operation has been effective is strongly indicated by the Association's steady growth, as evidenced by the summary for the 26-year period 1928-1953 attached hereto as EXHIBIT "A".

D. Proposal to Purchase Embassy Dairy, Inc.: We are informed that this is the only major dairy

in Washington that does not have a supply contract with the Association; and that it has always looked elsewhere for its supply.

In a recent "Washington Area Milk Market Study", prepared for the Association, a sample of the market indicates that the following dairies are serving the stated percentages of the total households in Washington which use plain milk:

	%
Chestnut Farms (National Dairies affiliate)	42.8
Lucerne	27.7
Thompsons	19.0
EMBASSY	9.4
Alexandria Dairy	3.0
High's	2.0
Wakefield	1.4
Harvey	1.2
Golden Rule	.5
Purity Farms	.2
No brand given	2.8

(some households reported use of more than one brand, causing the column to add up to more than 100%)

Not listed are Richfield and Martins.

[fol. 1693] The Association has informed us that the relative size of the several dairies, volume-wise, is about as follows (not including Armed Services contracts or surplus sales) in the entire Metropolitan Washington Market:

Dairy	*% Wholsale and Retail Route Sales*	*% Supplied by Association*
Chestnut Farms	45	100.
Thompson's Dairy	15	99.8
Lucerne Milk Company	14	100.
Embassy Dairy	7	—0—
Alexandria Dairy Products	7	100.
Harvey's Dairy	3	100.
Wakefield Dairy	3	33.3
Richfield	2	100.
Highland Farms	1	—0—
Martins' Dairy	1	100.
Golden Rule) Birmingham) Lone Pine) Loudon Farms)	2	100.
	100.	

Purity Farms, a small producer-distributor at Gaithersburg, Maryland, is not included. High's is included with Wakefield. Armed Services and surplus sales amount to about 9,000,000 pounds. The Association supplies about 85 percent of the market, and 90 percent of route sales. The latter is expected to increase to 97 percent with the acquisition of Embassy.

It is reported that the Embassy plant, one of the better-equipped plants in the city, has a capacity for handling 35,000 gallons of fluid milk daily and that it is handling around 18,000 to 20,000 gallons. It is not equipped for manufacturing. About 70 percent of this volume is sold as Class I, and 30 percent as Class II; about 50 percent retail and 50 percent wholesale, including 3,000 gallons daily on a bid basis.

The Association reports that Embassy procures about 12,000 gallons daily from 113 producers holding District of Columbia permits, and about 8,000 gallons from producers in Maryland, Pennsylvania, and on the Delmarva Peninsula (Eastern Shore) who do not have D.C. permits; also, that all of these producers will be diverted to the Baltimore market except six who are located in Virginia and have Washington permits. The latter will probably join the Association.

We are informed that all of the common stock and more than two-thirds of the preferred stock of Embassy Dairies, Inc. is owned by Green Spring Dairy, Inc., Baltimore, Maryland, which is in turn owned by Mr. James J. Ward. Green Spring Dairy, Inc. also owns the Green Spring Milk Company at Queenstown, on the Eastern Shore of Maryland, and Mr. Ward owns the Homestead Dairy Products Company, Salisbury, Maryland.

[fol. 1694] It appears that the Association wants to acquire and operate the Embassy property for a two-fold purpose: (1) to rid the market of an unstable influence, and (2) to acquire an additional outlet for Class I and Class II milk produced by its members which is now being marketed as surplus.

The Association informs us that Mr. Ward is willing to sell Embassy (at a very substantial profit) in order to concentrate his dairy operations at the other points mentioned above.

The Association has estimated that its ownership and operation of the Embassy business should result in immediate financial benefits to its members about as follows:

1. Increase the price for 14,000 gallons per day now being marketed by all dealers on bid-contracts from the present $3.50 per hundredweight to Class I price, at present $6.62 per hundredweight. This increase of $3.12 per hundredweight on 124,400 pounds daily would amount to $3,756 per day.

   312 days (6-day week) @ $3,756 $1,171,872.

2. Probable transfer of 8,000 gallons daily of present Embassy volume to other handlers with Association supply contracts. This would come out of present Association surplus and probably be marketed 70 percent Class I and 30 percent Class II, for which the present blend price would be $5.53 per hundredweight, compared to present value of $2.40, a difference of $3.13, or $2,153 per day.

   312 days @ $2,153 $ 671,736.

3. Expected retention of 12,000 gallons daily volume at Embassy plant, to be sold about 70 percent Class I and 30 percent Class II, or an average excess of $3.13 per hundredweight above surplus prices, or $3,230 per day.

   312 days @ $3,230 $1,007,760.

4. Plus the "normal" earning capacity of the plant on 12,000 gallons daily volume marketed on a 70/30 percent Class I and Class II basis.

   "Normal" earning expectancy $ 250,000.

5. Total Maximum Benefits per Annum $3,101,368.

It does not seem reasonable to expect anywhere near the financial benefit indicated in paragraph 1 above ($1,171,872). This bid-contract business (Army bases, institutions, etc.) does not have to

meet D.C. inspection. U.S. Health Department inspection is all that is necessary; and it is very doubtful if these buyers would pay very much more [fol. 1695] than present prices just to procure D.C. inspected milk in preference to other available supplies. There seems to be more merit in items 2 and 3, and possibly 4. And it does seem reasonable to expect real, immediate financial benefits in substantial amounts by the diversion of some 20,000 gallons daily of the present Association surplus to Class I and II distribution through the Embassy plant and other handlers depending upon the Association for their milk supply.

For an analysis of the favorable and unfavorable factors surrounding this proposal, attention is directed to the attached EXHIBIT "B"—copy of a letter addressed to the Bank on June 8, 1954, by Mr. Donald E. Hirsch, Chief, Dairy Branch, Farmer Cooperative Service, USDA. His analysis of the various factors appears to be sound, and we agree with his conclusions as stated in the last paragraph of his letter.

II. MEMBERSHIP RELATIONS:

A. *Number of Members and Volume of Business*: The Association reports 1,917 members at December 31, 1953, all of whom are farmers and each of whom has one vote. All business is transacted with members, none with non-members.

The Association has submitted the following summary showing volume of business for the past three years:

Year	*Dollar Value Milk Sold*	*Total Pounds Milk Sold*	*Dollar Value Dairy Supplies*
1951	$29,909,109.64	505,553,036	$504,495.69*
1952	32,984,562.11	531,749,249	760,593.22*
1953	34,255,364.55	596,422,556	853,724.49*

* Does not include direct-ship purchases by members.

The Association has also submitted information showing members' milk production by states and counties, together with the name of the director serving each county. The production figures are summarized as follows:

State	*Number of Members*	*April 1954 Production (pounds)*
Virginia	969	26,264,849
Maryland	871	25,812,009
Pennsylvania	46	1,266,987
West Virginia	44	1,063,449
Totals	1,930	54,407,294

By referring to the county list, it is observed that about 21,000,000 pounds of the Virginia production is in Loudoun, Culpeper, Fauquier, Fairfax, and Prince William Counties, of importance in the order named, and that almost 20,000,000 pounds of the Maryland production was in Frederick and Montgomery Counties. The Association has members in 38 Virginia counties, 15 Maryland counties, 5 Pennsylvania counties, and 3 West Virginia counties.

[fol. 1696] B. *Requirements for Membership*: Only dairymen are eligible as members, and the bylaws provisions regarding eligibility are more or less standard. All members are required to sign the standard marketing agreement, and the Association issues each member a non-transferable certificate of membership. The membership fee is $100.

C. *Voting Power*: Each member has only one vote. Membership may be canceled when a person ceases to be eligible or to patronize the Association.

D. *Marketing Contract*: The contract presently used by the Association has been changed several times, but in principle is similar to the one used many years ago. The present contract provides for the following:

The producer agrees to:

(1) Deliver all milk he produces except a reasonable amount for home consumption, to the Association. (He cannot sell any milk to any one else but the Association).

(2) Pay the Association 11.6 cents per hundredweight for all milk marketed by the Association. (This rate is 6 cents per hundredweight in the case of producers delivering to receiving stations).

(3) Deliver milk to distributor designated by Association.

(4) Meet Health Department regulations.

The Association, as agent, agrees to:

(1) Sell or dispose of all the marketable milk the producer delivers.

(2) Pay the producer the market price for all marketable milk the producer delivers. (Marketable milk is any milk that meets Health Department requirements).

(3) Guarantee collection and payment for milk delivered.

The contract when signed remains in effect for a period of three years and continues in effect each year thereafter unless canceled upon proper notice by either party.

The contract also provides that the member be bound by the bylaws and by all the rules and regulations of the Association. The bylaws provide that the member is to market his output in ac-

cordance with rules adopted by the Association. Both the contract and the bylaws provide for liquidated damages.

E. *Information Program*: It appears that the Association is doing an excellent job in keeping its members informed. This is accomplished by continuous contact of members by fieldmen, by a monthly market news publication, by occasional printed pamphlets and brochures giving complete information about the Association's objectives, method of operation, and accomplishments. Each member also receives a printed copy of the Association's annual report which gives rather complete information financial and otherwise.

F. *Recent Membership Meetings*: The Association is presently engaged in holding a series of special membership meetings over its entire membership area. The purpose of these meetings is to explain [fol. 1697] in detail the Association's proposal to acquire and operate the Embassy Dairy.

It was the privilege of the undersigned to attend the meeting held at Leesburg, Virginia, on June 3, 1954. I accompanied Association officials to the meeting, but was not introduced to the members and did not take any part in the meeting. I was pleased to observe that Association directors and officers made a full and complete presentation of this matter to the members, which presentation was followed by a question and answer period which lasted about an hour. Pertinent questions were freely asked from the floor and frankly answered by the officers and directors.

There were about 175 members present at this meeting, at the close of which there was unanimous endorsement of the proposal. This endorsement included the Association's proposal to defer any further cash refunds until the Association is out of debt and to supply all milk needed by the Embassy plant at surplus prices and leave all

net operating margins derived from the operation of that plant in the Association as capital, such retentions, of course, to be allocated annually to all members of the Association on the basis of their total patronage. The matter of Federal income tax liability on the part of the members for capital left in the Association was also discussed. There appeared to be the usual tendency, as in meetings of this character, to minimize the difficulties and problems that may be encountered and perhaps to overemphasize the financial benefits that may reasonably be expected to accrue from this new venture. It appeared, however, that the potential benefits to be derived as a result of selling as Class I and Class II milk what is now surplus milk are very real and doubtless outweigh the disadvantages that may be encountered.

G. *Conclusion*: It is believed that the Association's membership relation program is both sound and aggressive.

III. MANAGEMENT AND DIRECTORATE:

A. *Board of Directors*: The Association's articles of incorporation state that the Association shall have a board of 30 directors. The bylaws provide for 21 directors, which is the number the Association has had for many years. This has been called to the attention of the Association and will be cleared at the first opportunity. The legal department seems to think that this situation will not adversely affect the Bank's interest for the reason that the number of directors does not exceed the number for which provision is made in the articles of incorporation.

The membership area is divided into districts with approximately the same number of members in each district. The territory is re-districted by the board of directors from time to time. The members of each district nominate a director, which [fol. 1698] director is elected by all the members

at the annual meeting. A review of the names of these directors indicates that they are high calibre and are representative of the most successful dairymen in the area.

Names and addresses of the officers of the Association are as follows:

J. Homer Remsberg, President
Middletown, Maryland
C.H. Bowen, 1st Vice President
Remington, Virginia
Basil Mobley, 2nd Vice President
Derwood, Maryland
B.B. Derrick, Secretary-Treasurer
1756 K. Street, N.W.
Washington, D.C.
W.B. Hooper, Assistant Secretary and
Assistant Manager
1756 K Street, N.W.
Washington, D.C.

Neither Mr. Derrick or Mr. Hooper is a Director.

B. *Management and Personnel*:

1. *Central Office and Supply Warehouse*: Key men are as follows:

Bruce B. Derrick, Secretary-Treasurer, is really the General Manager. He has carried on the affairs of the Association since 1934 and has been very successful. Mr. Derrick is approaching retirement age, but expects to be on the job a few years yet—at least in a supervisory or counsellor capacity. He has a very capable staff of men under him, several of whom in his opinion are capable of replacing him at any time.

W.B. Hooper, Assistant Manager and Assistant Secretary, is Mr. Derrick's righthand man, and a very capable one at that. He has been with the Association since 1935 and had prior

experience with the USDA. Mr. Hooper is about 45 years of age, married, and has three children. We understand that the board will probably designate him to give general supervision to the operation of the Embassy plant.

J.E. Click, the Association's Economist, has been with the Association a number of years. He is an agricultural college graduate.

C.F. Bletch, the Production Supervisor, has 7 fieldmen under him. He is reported to be very capable.

The Milk Expeditor is J.E. Burton, who came to the Association several years ago after working with the Department of Agriculture's Marketing Administration.

The lab technician is William Kreh. He has 3 men in the laboratory with him.

[fol. 1699] Paul Snyder is the Supervising Accountant and Office Manager. He and his staff report to Mr. Hooper.

C.F. Cole is in charge of the Dairy Equipment Purchasing Department, and T.W. Lawler works with him as Sales Supervisor, with 3 men to assist him.

The Association is capably staffed by experienced men.

2. *Proposed Embassy Division*: The Association has employed Ridgely Parks, effective July 1, 1954, to manage the operations of the Embassy plant under the general supervision of the main office. They have given him a 5-year contract at $20,000 per annum. Incidentally, we are informed that Mr. Derrick's total compensation last year was $22,000; Mr. Hooper's $10,000. Mr. Parks is 44 years of age, married, and has two children. He is experienced in the dairy business and comes to the Associ-

ation highly recommended. He was General Manager of Green Spring Dairy in Baltimore from 1934 to 1948, and for the past four years has been Vice President in Charge of Sales for Koontz Dairy in Baltimore. He is a University of Maryland graduate.

We are informed that the Association intends to retain all of the key personnel in the Embassy Dairy plant from the plant superintendent on down.

The plant has a closed shop, as is the case with all major dairy plants in Washington. The plant employees are members of the AF of L. It is our understanding that the labor union contracts in all plants in the District of Columbia are uniform in every respect. We have also been informed that the morale of the personnel at this plant is considered good.

C. *Conclusion*: It is believed that the Association is well managed and capably staffed in every department.

IV. Method of Operation:

This subject has been pretty well covered in the comments on pages 2 to 5 of this report, as supplemented in the operations section of the Treasurer's Credit Report. No further comments are needed here.

V. Competitive and Economic Factors:

As indicated elsewhere in this report, the Association exercises rather close control over the production and distribution of most of the milk distributed in the District of Columbia and in the Metropolitan Washington Market. This is facilitated by the fact that there are fewer distributors in this market than in most other markets of comparable size. There is little doubt that the Association's members produce as high quality milk as is to be found anywhere, and that they come fairly close to living up to their slogan

"Producers of the World's Highest Quality Milk". Also, the Washington market has always been a growing market and relatively stable—much more so than most of the large industrial markets. While the problem of surplus milk arises from time to time, the [fol. 1700] Washington market has not been plagued by the surplus milk problem as have most large markets.

Worth noting are the comments made by Mr. Hirsch under section 4 on page 3 of the attached EXHIBIT "B".

VI. COOPERATIVE ASPECTS:

Reference is made to the two memoranda of the legal department bearing date of June 4, and supplemental memorandum of June 9, 1954, which are incorporated as a part of this report.

In view of the comments of the legal department, it is recommended that the loan agreement include the following special conditions, as well as those outlined in the Treasurer's Credit Report:

(1) The Association's board of directors agrees to recommend to its membership for adoption not later than at its next annual meeting such changes, amendments, or additions to its charter, bylaws, and marketing agreement, as may appear to the Bank and to the Association's attorney to be desirable.

(2) Not later than immediately after the Association's regular monthly board meeting in the month of July, 1954, the Association shall supply the Bank a certified copy of a resolution, in form and substance acceptable to the attorney for the Association and to the attorney for the Bank, adopted at that meeting by the Association's board of directors for the purpose of setting forth the obligation of the Association to account to its patrons for all funds received in excess of the cost of doing business.

VII. Conclusion:

It is believed that the Association has a membership, volume of business, management, and business policies of such character as to warrant favorable consideration of its request for loans; subject, of course, to the findings of the Treasurer's Credit Report as to the amount, security, and repayment provisions.

This report was prepared by the undersigned from information in the files and from information obtained during several conferences with representatives of the Association. Also, one membership meeting was attended.

/s/ Jno. B. Jones
Jno. B. Jones, Secretary

JBJ:DB
6-9-54
Copy for File
FCA
CB
BA
X

[fol. 1701]

Plaintiff's Exhibit 28

May 18, 1954

Memo to Burton

c.c. Snyder
Auditors
Click

Please notify all dealers, except Chestnut (they have been notified), that on all bids coming up between now and May 25 we will set a local price of $5.25.

A new price will be set for bids beginning May 26.

These bids are for the period July 1 to September 30 or any part thereof. Of course, it is understood that these

apply only to the Armed Services and other "job" bids such as institutions, etc., and in no way changes the formula for commissaries, PX, or general commercial type bids.

If you have any questions on this please check with me.

W. B. HOOPER

WBH:w

[fol. 1702]

PLAINTIFF'S EXHIBIT 29

COPY

AGREEMENT

This agreement made this 26th day of May 1954 between EMBASSY DAIRY, INC., a Delaware corporation, the Seller, and MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., a Maryland corporation, the Buyer, recites:

WHEREAS, Green Spring Dairy, Incorporated is the owner of the entire common and more than two-thirds (2/3) of the preferred capital stock of Embassy Dairy, Inc. and, through Embassy Dairy, Inc., is engaged in the wholesale and retail distribution of milk in the Washington metropolitan area, and James J. Ward is the owner of both these companies; and

WHEREAS, the Maryland and Virginia Milk Producers Association is desirous of purchasing certain assets and the good will of Embassy Dairy, Inc., with a view to carrying on its business and the milk business of the said Ward and the said Green Spring Dairy, Incorporated in the Washington metropolitan area;

NOW, THEREFORE, the Seller agrees to sell to the Buyer and the Buyer agrees to purchase from the Seller the assets listed below for the total sale price of Two Million Five Hundred Thousand Dollars ($2,500,000.00) net to the Seller after assumption of payment by Buyer as of March 31, 1954 of a first mortgage on Seller's fixed assets, the amount due on which mortgage as of said date being Four Hundred Forty Thousand Eight Hundred Fifteen Dollars and Twenty-one Cents ($440,815.21); the Buyer hereby

agreeing to reimburse the Seller for any payments made by Seller to the mortgagee subsequent to the date hereof pursuant to the requirements of said mortgage. It is understood that on the closing date, as hereinafter provided, said mortgage shall be prepaid in its entirety with funds provided by the Buyer which shall also pay all expenses of prepayment including the premium therefor as set forth in said mortgage. The terms and conditions of the sale are as follows:

[fol. 1703] 1. (a) Upon the signing of this agreement, the sum of One Hundred Thousand Dollars ($100,000.00) cash shall be deposited in escrow by the Buyer with the National Metropolitan Bank of Washington, D.C. which shall be paid by the bank to the Seller on the closing date and applied by the Seller on account of said purchase price provided, however, that if the Buyer fails for any reason to consummate the settlement as herein agreed upon on or before August 1, 1954, said sum shall be paid by the bank to the Seller on said date and applied by the Seller on account of liquidated damages to Seller as a result of such failure. Said sum, together with an additional sum of One Hundred Thousand Dollars ($100,000.00) which the Buyer agrees to pay to the Seller on August 1, 1954 in the event the Buyer does not complete the purchase as herein agreed upon, shall constitute liquidated damages in full to the Seller for the failure of the Buyer to consummate this agreement as aforesaid.

(b) One Million Dollars ($1,000,000.00) cash shall be paid to the Seller on July 1, 1954.

(c) The balance of One Million Four Hundred Thousand Dollars ($1,400,000.00) shall be paid on or before August 1, 1954 at the time of a settlement which shall be arranged by mutual agreement between the parties.

(d) Upon completion of the payments above specified, the Buyer shall receive from the Seller free and clear from any claim of any kind, sort or description whatsoever the following:

(1) Good will of Embassy Dairy, Inc. milk routes and the business as a going concern.

(2) Fixed assets, subject to the first mortgage hereinabove described, as follows:

Land owned in Washington, D.C. and Fairfax, Virginia
Buildings
Machinery and Equipment
Office Furniture and Fixtures
Garage Equipment
[fol. 1704] Diet Kitchen Equipment
Tools and Laboratory Equipment

(3) All automotive equipment carried on the books of the company as of March 31, 1954, except such as is listed on Appendix 1, and including automotive equipment listed on Appendix 2, attached hereto and made a part hereof.

(4) All bottles, containers, cans, cases, etc. in use as of the closing date in the operation of Embassy Dairy, Inc.

(5) Ninety-two (92) shares of capital stock of the Washington Milk Bottle Exchange.

(6) Three (3) machines (American Can Company fillers) with change parts.

(7) All patents, trade marks, trade names, slogans owned or used by Embassy Dairy, Inc. It is expressly understood that the slogan "Life Begins With Embassy Milk" may be used by the Buyer, but that Green Spring Dairy, Incorporated and its affiliates may use such slogan without the word "Embassy" included therein. The Seller shall have full title to the trade name "Green Valley" and any right to use it on any container; the Buyer, however, shall not be obligated to purchase any Green Valley containers.

(8) Leases on and agreement to lease parking lots and warehouse and on a "Pure-Pak" machine and on fifteen (15) new White Trucks with refrigerated Hackney bodies. The Seller agrees to assign these leases and agreement to lease to the Buyer and to obtain the consent of the lessors thereto and the Buyer agrees to assume all the obligations and liabilities under said leases and agreement to lease.

[fol. 1705] Items of current equipment to be delivered to the Buyer shall be as shown by the books of the company as of March 31, 1954, plus any additions thereto up until the date of closing (excluding any trade-ins and retirements in the normal course of business.)

2. In addition, the Buyer shall pay the Seller the balance due on all active accounts and notes receivable, excluding notes and accounts receivable of affiliated companies, but including an account receivable of approximately Five Thousand Three Hundred Dollars ($5,300.00) due from Drug Fair, Inc. for dispensers on consignment, at their face value at the date of closing. Said accounts shall be assigned by Seller to Buyer and all other accounts shall remain the property of the Seller.

3. The accounts payable as of the closing date and all other obligations of the Seller shall be paid by the Seller, who will comply with the provisions of the Sales-in-Bulk Act (D.C. Code (1951) 28: 1701, 1702).

4. (a) The Buyer will purchase on the closing date, at dairy products, cost to the Seller those inventories of supplies and materials (including new repair parts, bottles, cans and cases) which have not been placed in use. JJW JHR

(b) Buyer will purchase from Seller the dispensers of Seller on loan to customers at their appraised value as determined by E. A. Kaestner Company.

(c) The Buyer will purchase from Seller its inventories of rebuilt automotive and plant units which have not been placed in use, at seventy-five per cent (75%) of the Seller's net purchase price for corresponding new units.

5. The Seller shall at the time of closing cancel all insurance coverages (except life insurance) now in force and the Buyer shall be responsible for all liability and [fol. 1706] compensation claims occurring thereafter. The Seller shall be entitled to all prepaid premiums and all posted reserve returns from time to time as settlement of outstanding claims are consummated.

6. The Seller will undertake to persuade as many of its producers as possible to ship to the Green Spring Dairy and/or Green Spring Milk Company; in the event any refuse so to do, the Seller will use its best efforts to persuade them to become members of Buyer's organization.

7. Seller's taxes, licenses, water and utility charges and rentals shall be adjusted as of the date of closing. Any deeds, bills of sale or other instruments which the Buyer may require to consummate this agreement shall be executed at Buyer's expense by the Seller and the cost of any title examination and documentary stamps shall be borne by the Buyer.

8. Payment of Ten Thousand Dollars ($10,000.00) due Seller from Crown Cork and Seal shall be paid to the Seller.

9. Buyer will assume the expense of accumulated vacation benefits of the Seller's employees as of June 30, 1954, Buyer's maximum liability, however, not to be in excess of Twenty-five Thousand Dollars ($25,000.00).

10. It is the Buyer's object in executing the present agreement to purchase from the Seller the entire milk business of the Seller and/or Green Spring Dairy and/or Green Spring Milk Company being done or capable of being done within the Washington market sales area, as delimited on the map attached hereto and made a part hereof. In consideration of the present agreement, Embassy Dairy, Inc. hereby covenants and agrees and will arrange that Green Spring Dairy, Inc., Green Spring Milk Company, Inc., Homestead Dairy Products Company, James J. Ward, James J. Ward, Jr., John Ward, and R. Jeanne Ward will covenant and agree by separate agreements that for a period of ten (10) years none of the above will [fol. 1707] engage, either directly or indirectly, in the wholesale or retail sale or distribution of milk, cream or other dairy products in the area delimited on the said map at-

tached hereto and made a part hereof, individually or through others, including any corporation now in existence or to be formed; this negative covenant shall include the sale or negotiation for sale of milk, cream or other dairy products outside the said area for delivery inside of said area. The Seller engages to implement this provision by executing and/or having the above corporations and individuals execute any separate agreements deemed necessary or advisable by the Buyer.

11. The Seller will deposit forthwith in escrow the sum of Five Thousand Dollars ($5,000.00) in the National Metropolitan Bank of Washington, D. C., to serve in its entirety as liquidated damages in the event the Seller for any reason fails or refuses to carry out the present agreement.

In testimony whereof the Embassy Dairy, Inc. has on this 26th day of May, 1954, caused these presents to be signed by James J. Ward, its President, and attested by Irene Koehl, its Secretary, and its corporate seal to be affixed.

EMBASSY DAIRY, INC.
(signed) James J. Ward
President

(SEAL)

(signed) Irene Koehl
Secretary

In testimony whereof the Maryland and Virginia Milk Producers Association, Inc. has on this 26th day of May, 1954, caused these presents to be signed by J. Homer Remsberg, its President, and attested by B. B. Derrick, its Secretary-Treasurer, and its corporate seal to be affixed.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

(signed) J. Homer Remsberg
President

(SEAL)

(signed) B. B. Derrick
Secretary-Treasurer

[fol. 1708]

Unit No.	Year	Name	Address	Title No.	Make	Value
T 2	1946	Embassy	D.C.	dc C58245	White Tractor	$ 350.00
T 3	1946	"	"	DC C72897	" "	350.00
T 4	1951	"	Md.	MD E-408862	GMC-Diesel	2400.00 No
T 5	1951	"	Md.	MD E-408863	GMC-Diesel	2400.00 No
T 6	1946	"	D.C.	DC C78518	White Tractor	350.00
T 7	1946	"	"	DC C78517	" "	350.00
T 10	1947	"	Md.	MDE-930138	Fruehauf Tank Trlr.	1500.00
T 11	1946	"	D.C.	TR 32714	Fruehauf Trlr.	400.00
T 13	1946	"	"	TR32717	" "	500.00
T 14	1946	"	"	TR32715	" "	400.00
T 15	1946	"	"	TR32712	" "	500.00
T 17	1946	"	"	TR32721	" "	400.00
T 20	1946	"	"	TR32716	" "	400.00
T 22	1953	"	"	TR 34739	Dorsey Trlr.	2000.00 No

Unit No.	Year	Name	Address	Title No.	Make	Value	
T 23	1946	"	"	T 32726	Fruehauf Trlr.	200.00	N.L.
T 24	1946	"	"	T 32723	" "	200.00	N.L.
T 25	1946	"	"	T 32725	" "	200.00	N.L.
T 26	1946	"	"	TR 32710	Highway Trlr.	200.00	N.L.
T 27	1946	"	"	TR32711	" "	200.00	N.L.
112	1936	"	"	C 78506	Ford Pickup	50.00	
146	1939	"	"	C 42675	GMC Van made into Tractor	75.00	
166	1941	"	"	C 42690	GMC Wrecker	500.00	
2	1950	"	"	DC X424126	Chev. Spt. Coupe	500.00	
3	1953	"	"	DC X614219	Ford Conv. Coupe	1500.00	No
4	1952	"	"	VA 5351244	Pontiac Sedan	1135.00	
5	1953	"	"	DC X630874	Chev. Bel Air Coupe	1540.00	No
6	1953	"	"	X 632111	Chev. Handy Man	1510.00	No
10	1952	"	"	X 639807	Chev. Sta. Wagon	1090.00	
12	1953	"	"	X 677599	Chev. Tudor	1080.00	

Appendix 2

[fol. 1709]

Embassy Dairy Equipment

	Replacement Values JJW JHR
3 Chevrolet business coupes at $1666.00	$ 4998.00
1 Ford Convertible coupe	2800.00
2 Chevrolet 1 ton panel at $2060.00	4120.00
2 Chevrolet Sedan Deliveries at $1800.00	3600.00
1 Chevrolet ½ ton pickup	1550.00
1 2½ ton International dump truck	4000.00
1 5 ton GMC dump stake	5700.00
1 Model 33 Refrigerated Divco	4200.00
72 Model UM Divco's at $2800.00	201600.00
9 1 ton Montpelier Chevrolets (panel) at $2700.00	24300.00
2 WA22 White with refrigerated bodies at $8000.00	16000.00
1 WA22 White with 15 foot van body	6500.00
2 6403 Chevrolets with 12 foot insulated bodies at $3400.00	6800.00
1 COE Chevrolet with 14′ refrigerated body	5500.00
9 COE Chevrolets with 14′ van bodies at $3600.00	32400.00
1 2 ton Ford with 11′ van body	3000.00
1 2 ton Ford with 14′ van body	3000.00
1 5 ton GMC with 14′ insulated body	6200.00
1 2 ton GMC with 12′ van body	3200.00
1 GMC Diesel Tractor	9000.00
2 Fruehauf insulated at $6500.00	13000.00
1 1½ ton Ford panel	2100.00
	$363568.00

[fol. 1710]

PLAINTIFF'S EXHIBIT 30

BILL OF SALE

OF ACCOUNTS RECEIVABLE AND INVENTORY

Pursuant to paragraphs 2 and 4 of the basic agreement of May 26th, 1954, as amended by paragraphs 3 and 4 of the amendatory agreement of July 16, 1954, Embassy Dairy, Inc., a Delaware corporation, in consideration of the premises and of the sum of money provided to be paid to it under the said Agreement, as modified, does hereby bargain and sell to the Maryland and Virginia Milk Producers Association, Inc., its successors and assigns, all active accounts and notes receivable, excluding notes and accounts receivable of affiliated companies, at their face value as of the close of business July 31, 1954, together with all inventories of dairy products, supplies and materials, including new repair parts bottles, cans and cases, which have not been placed in use.

The price of said accounts receivable and inventories shall be the sum of EIGHT HUNDRED SIXTY-ONE THOUSAND—Dollars ($861,000) in accordance with the estimated value of the said accounts receivable and inventories, based upon an estimate made in writing by William Gordon Buchanan & Company, Certified Public Accountants, dated July 23, 1954. The said sum shall be subject to adjustment in accordance with the final determination of the value of said accounts receivable and inventories made prior to the beginning of business on August 2nd, 1954 by William Gordon Buchanan & Company and Wayne Kendrick & Company, Certified Public Accountants.

JW JR. ~~Under the same conditions and subject to the same adjustment~~, Embassy Dairy, Inc. likewise hereby bargains and sells to the Maryland and Virginia Milk Producers Association, its successors and assigns, its dispensers on loan to customers at their appraised value as determined by E. A. Kaestner Company, as of July 31, 1954.

[fol. 1711] Under the same conditions and subject to the same adjustments, Embassy Dairy, Inc. likewise hereby bargains and sells to the Maryland and Virginia Milk Producers Association, Inc. its inventories of rebuilt automotive and plant units which have not been placed in use at Seventy-Five Percent (75%) of the seller's net purchase price, the value of which is included in the total sum of Eight Hundred Sixty-One Thousand Dollars ($861,000) referred to in the second paragraph of page 1 of this document.

Embassy Dairy, Inc. hereby covenants that all accounts receivable sold herein shall be active, namely, that the debtors either are present customers of Embassy Dairy, Inc. or that substantial payments have been made on the said accounts within the ninety (90) day period prior to July 31st, 1954.

Embassy Dairy, Inc. likewise covenants that it has the right to sell the inventories and other personal property enumerated herein and that it will warrant and defend the same against all lawful claims or demands of any person.

IN WITNESS WHEREOF, Embassy Dairy, Inc. has caused this Bill of Sale to be signed and sealed by its duly authorized officers this 26th day of July, 1954.

EMBASSY DAIRY, INC.

/s/ JAMES J. WARD JR.
Vice-President

Attest:

/s/ IRENE KOEHL
Secretary

(SEAL)

[fol. 1712]

PLAINTIFF'S EXHIBIT 32

AGREEMENT

Whereas, Embassy Dairy, Inc., and the Maryland and Virginia Milk Producers Association, Inc., have entered into an agreement dated May 26, 1954 which is attached hereto and made a part hereof, and

Whereas, James J. Ward is the owner of the entire capital stock of Green Spring Dairy, Inc., which in turn is the owner of the entire common and more than two-thirds (⅔) of the preferred capital stock of Embassy Dairy, Inc., and

Whereas, Green Spring Dairy, Inc., and the said James J. Ward have been engaged in the wholesale and retail distribution of milk in the Washington Metropolitan Area, and

Whereas, the Green Spring Milk Company is owned by Green Spring Dairy, Inc., and Homestead Dairy Products Company is owned by James J. Ward, and

Whereas, James J. Ward, Jr., John Ward and R. Jeanne Ward are the sons and daughter of James J. Ward and are now or have been engaged in the milk business of the said James J. Ward and are financially interested in or will be financially benefited by the agreement of May 26, 1954 above referred to,

Now, therefore, in consideration of the said agreement of May 26, 1954, the sum of One Dollar ($1.00) in hand paid, receipt of which is hereby acknowledged and other good and valuable consideration, the above corporations and individuals covenant and agree that for the period of ten (10) years from date none of the above will engage either directly or indirectly in the wholesale or retail sale or distribution of milk, cream or other dairy products in the area delimited on the map attached to and made a part of the said agreement of May 26, 1954, either individually or through others including any corporation now in existence or to be formed.

This negative covenant shall include the sale or negotiation [fol. 1713] for sale of milk, cream or other dairy products outside the said Metropolitan Area for delivery inside it.

In witness whereof the above corporations have caused this said agreement to be signed and sealed by its duly authorized officers and the individuals above named have hereunto affixed their names and seals this 26th day of May, 1954.

GREEN SPRING DAIRY, INC.
/s/ JAMES J. WARD
President
(SEAL)

/s/ ROBERT S. FISHER
Secretary

GREEN SPRING MILK COMPANY
/s/ JAMES J. WARD
President
(SEAL)

/s/ R. JEANNE WARD
Secretary

HOMESTEAD DAIRY PRODUCTS COMPANY
/s/ JAMES J. WARD
President
(SEAL)

/s/ ROBERT S. FISHER
Secretary

/s/ JAMES J. WARD
James J. Ward
(SEAL)

/s/ JAMES J. WARD, JR.
James J. Ward, Jr.
(SEAL)

/s/ JOHN A. WARD
John Ward
(SEAL)

/s/ R. JEANNE WARD
R. Jeanne Ward
(SEAL)

[fol. 1714]

PLAINTIFF'S EXHIBIT 33

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4482-56

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED,

Defendant.

STIPULATION No. 1

It is hereby stipulated and agreed by and between the United States of America and Maryland and Virginia Milk Producers Association Incorporated, by their attorneys, that each of the attached narrative statements of W. Gwynn Gardiner, Samuel H. Harvey and Arthur Lee Thompson may be offered by plaintiff and admitted in evidence at the trial of this cause and, when admitted in evidence, shall be entitled to the same force and effect as if the matters contained therein were testified to under oath upon direct and cross examination by the person whose testimony is set forth in such narrative statement, subject, however, to objections as to relevancy or materiality. By this stipulation the parties agree that each of said narrative statements may be offered and admitted in evidence regardless of availability of the person as a witness and notwithstanding unavailability, disability, death or other cause which would render it impossible for the person to be present at the trial to testify, and that, if the statement of any of said persons is offered and admitted, neither party may examine said person as to any testimony contained in such statement.

/s/ JOSEPH J. SAUNDERS
Attorney for the United States

3/18/58

/s/ WILLIAM J. HUGHES, JR.
Attorney for Maryland and Virginia
Milk Producers Association, Incorporated

[fol. 1715] ARTHUR LEE THOMPSON

The testimony of Arthur Lee Thompson as to certain facts alleged to be relevant and material to issues in the pending cause is as follows:

That for many years he has been president, treasurer and principal stockholder of Thompson's Dairy, Inc., which has been engaged in the fluid milk distribution business in the Washington metropolitan area. That, since at least 1950, Thompson's Dairy has purchased most of its milk from Maryland and Virginia Milk Producers Association (hereinafter "the Association"), obtaining the remainder from independent producers.

That, in or about the period 1935-1939, the Association refused to cooperate with Thompson's in allowing Thompson's to establish a receiving station in Frederick County, Maryland, or elsewhere within the Association's production area. That he requested Mr. Derrick on frequent occasions, without success, to define the area of production which was sacred to Chestnut Farms, because Thompson's had had the experience, repeatedly, of agreeing to take the milk of certain producers and then having their milk diverted to the receiving station of Chestnut Farms Dairy; that he could never obtain a consistent statement of the Association's policy relative to receiving stations from Mr. Derrick, receiving only vague and varying explanations involving truck hauling conditions, read conditions, and other matters; that the Association would not agree to assign producers to deliver their milk to a Thompson's receiving station, in the event one were established by Thompson's.

That, in the first part of June 1954, he received a telephone call from B. B. Derrick, secretary-treasurer of the Association, who said he would like to come over to Thompson's with Mr. Hooper; that on or about June 11, 1954, Messrs. Derrick and Hooper came to his office at which time Mr. Hooper discussed the Association's plans to purchase the assets of Embassy Dairy, Inc., and stated that the [fol. 1716] Association expected to replace the milk which Mr. Ward had been buying with milk from Association members, that action by Thompson's to obtain the Embassy

producers as shippers would queer the deal, that the Association's Embassy was not going to bid on Government contracts and the Association would not make reductions in prices to dealers for milk for government contracts as it had been doing, and that the Association's Embassy would gradually cease giving the discounts which Embassy Dairy, Inc., had been giving.

[fol. 1717]

PLAINTIFF'S EXHIBIT 35

Admission: Shippers of D. C.-inspected milk to Embassy Dairy, Inc:

1050. Sources of supply of District of Columbia-licensed milk, other than defendant, from which Embassy Dairy, Inc., regularly obtained such milk in or about May 1954 were:

Charles E. Adkins	Ijamsville, Maryland
J. Russell Allnutt No. 1	Buckeystown, Maryland
J. Russell Allnutt No. 2	Buckeystown, Maryland
J. Russell Allnutt, Agent for Mary S. Baker	Buckeystown, Maryland
Carroll Ausherman	R.F.D. #1, Adamstown, Maryland
Earl D. Ausherman	Walkersville, Maryland
Ray Baer	Lewistown, Maryland
Walter Buxton & Sons	R.F.D. #2, Mt. Airy, Maryland
Wilbur Carson	Route #2, Mt. Airy, Maryland
Paul H. Clemson, Jr.	R.F.D. #2, Frederick, Maryland
J. R. Coursey	Chester, Maryland
Covert F. Crowder	Queenstown, Maryland
R. R. Dern	Keymar, Maryland
Enos Diller	Route no. 2, Hagerstown, Maryland
Earl E. Dixon	Boyds, Maryland
Eugene Doody #3	Frederick, R.F.D. #3, Maryland
C. S. Dorsey	Germantown, Maryland
Paul W. Droneburg	R.F.D. #1, Ijamsville, Maryland
Aubrey Dutrow	Ijamsville, Maryland
P. E. Ecker	Union Bridge, Route #2, Maryland
John M. Eshleman	Route #6, Hagerstown, Maryland
Albert Esworthy	R.F.D. #1, Mt. Airy, Maryland

R. E. Everhart	Jefferson, Maryland
Felix Flanagan	Walkersville, Maryland
Ralph G. Flanagan	Walkersville, Maryland
G. Monroe Free	New Market, Maryland
Harold M. Free	Route #5, Frederick, Maryland
Harry M. Free	R.F.D. #5, Frederick, Maryland
W. H. Fulks, #1	Gaithersburg, Maryland
W. H. Fulks #2	Gaithersburg, Maryland
W. H. Fulks #3	Laytonville, Maryland
W. H. Fulks #4	R.F.D. #1, Gaithersburg, Maryland
Stuart L. Geisbert	Walkersville, Maryland
Francis Ginn	Dickerson, Maryland
Harry J. Glisen #1	Mt. Airy, Maryland
Harry J. Glisen #2	Mt. Airy, Maryland
Harry J. Glisen #3	Mt. Airy, Maryland (R.F.D. #2)
H. D. Grosanickle	Boonsboro, Maryland
Ralph Grosanickle	R.F.D. #1, Frederick, Maryland
Arthur R. Guyton	Burkettsville, Maryland
J. C. Hall	R.F.D. #1, Frederick, Maryland
James A. Hatton	Boyds, Maryland
G. Edgar Hawker	Route #4, Frederick, Maryland
Edwin G. Hawkins	Route #2, Frederick, Maryland
H. F. Hines	R.F.D. #4, Frederick, Maryland
George W. Hoffman	Route #4, Frederick, Maryland
[fol. 1718]	
C. Ellis Hood No. 1	Route #2, Mt. Airy, Maryland
C. Ellis Hood #2	R.F.D. #2, Mt. Airy, Maryland
John A. Hope, Jr.,	Jefferson, Maryland
Louis Horman	R.F.D. #1, Adamstown, Maryland
W. Alton James (Springfield Farms)	Easton, Maryland
Ralph Kahne	R.F.D. #1, Frederick, Maryland
Edgar M. Keller & Sons	Middletown, Maryland
Thomas G. Kelley	Germantown, Maryland
J. S. Kelly	Adamstown, Maryland
A. R. Kemp #2	Route #1, Frederick, Maryland
Harry W. Krantz	R.F.D. #5, Frederick, Maryland
Wade Kunkle	Mount Airy, Maryland
D. D. Marker	Middletown, Maryland
Henry Martin	R.F.D. #6, Hagerstown, Maryland
Lewis B. Martin	R.F.D. #6, Hagerstown, Maryland

John Milne (Kennersley Farm)	Church Hill, Maryland
N. T. Morse	28 Carroll Avenue, Takoma Park, Md.
E. V. Moser	Middletown, Maryland
William V. Niemyers	R.F.D. #5, Hagerstown, Md.
C. Earl Page	Adamstown, Maryland.
F. C. Pearl	Lander, Maryland
Glenn E. Pearl	Lander, Maryland
Edwin Pippin	Benton, Maryland
Louis M. Plansoen (Mulberry Hill Farm)	Easton, Maryland
Harry T. Plunkard	Ijamsville, Maryland
Rhudel T. Putman	Knoxville, Maryland
Harold Remsburg	Middletown, Maryland
W. H. Renn No. 1	Adamstown, Maryland
Charles L. Rice	Ijamsville, Maryland
W. S. Ritnaur	Germantown, Maryland
H. Wilson Roderick	R.F.D. #2, Frederick, Maryland
William H. Roderick	Route #2, Frederick, Maryland
George A. Savage	R.F.D. #1, Rockville, Maryland
Leroy Savage	Route No. 1, Boyds, Maryland
Charles S. Schredel	R.F.D. #1, Frederick, Maryland
Harold Shankle	R.F.D. No. 1, Adamstown, Maryland
R. Monroe Shankle	R.F.D. No. 1, Adamstown, Maryland
Arthur E. Shook	Route No. 1, Adamstown, Maryland
M. D. Shook or E. M. Spangler	Route No. 4, Frederick, Maryland
C. T. Smith	R.F.D. No. 1, Frederick, Maryland
Mr. John E. Smith	R.F.D. No. 1, Frederick, Maryland
Monroe E. Smith	R.F.D. No. 1, Frederick, Maryland
George D. Specht	Jefferson, Maryland
Ralph F. or Nellie M. Staley	Boyds, Maryland
Glenn Stunkel	R.F.D. #1, Dickerson, Maryland.
[fol. 1719]	
Samuel Summers, Jr.	Route No. 1, Frederick, Maryland
John C. Sutton, Jr.	Galena, Maryland
A. G. Thomas	Adamstown, Maryland
C. C. C. Thomas	Adamstown, Maryland
C. E. Thomas #1	Gaithersburg, Maryland
C. E. Thomas #3	Gaithersburg, Maryland
C. E. Thomas #4	Gaithersburg, Maryland
C. L. Thomas, Jr.	Lilypons, Maryland

C. L. Thomas, Sr. #4	Lilypons, Maryland
Louise P. Thomas No. 1	Adamstown, Maryland
Mrs. Myra V. Thomas	Route No. 3, Frederick, Maryland
Thompson Furniture Co. Farm	Germantown, Md. (1810 R.I. Ave., N.E.
Dr. L. G. Timanus	Queenstown, Md.
Samuel G. Tressler	R.F.D. #2, Mt. Airy, Maryland
Allen W. Van Fossen	R.F.D. #2, Walkersville, Md.
E. A. Van Fossen	Walkersville, Maryland
Herbert W. Watkins	Germantown, Maryland
Oliver R. Watkins	Germantown, Maryland
Edward C. Wilcox	Ijamsville, Maryland
Laurence R. Wilcox	Ijamsville, Maryland
H. Lee Willis	R.F.D. #2, Box 41, Frederick, Md.
Howard S. Wilt	Adamstown, Maryland
George A. Young, Jr.	Route #2, Gaithersburg, Md.
Howard V. Zimmerman	Route #1, Mt. Airy, Maryland
Mrs. Amanda Cassell	Calverton, Virginia
E. E. Dwyer	R.F.D. #1, Elkwood, Virginia
Mrs. Blanche Laws #2	Catlett, Virginia
John M. Musselman	Remington, Virginia
Mason F. Smith, Jr.	Herndon, Virginia
Henry B. Sutphin & Allen F. Converse	Route #1, Chantilley, Virginia
H. W. Everhart #2	Kearneysville, West Virginia

[fol. 1720]

PLAINTIFF'S EXHIBIT 38

BALTIMORE BANK FOR COOPERATIVES

Memorandum of Field Visit

August 20, 1954

PLEASE INITIAL:

S.M.T.	*S.M.T.*
E.F.E.	*E.F.E.*
~~I.H.K.~~	*E.T.E.*
J.B.J.	*J.B.J.*
R.B.J.	*R.B.J.*
J.R.C.	√
J.P.M.	*J.P.M.*
F.L.V.	*F.L.V.*
L.M.C.	*L.M.C.*
J.J.G.	*J.G.*

Re: Maryland and Virginia Milk Producers Ass'n., Inc.
Washington, D. C.

The principal reason for my visit was to discuss with Mr. Hooper and Mr. Ray Richards, the association's insurance broker, the amount of insurance coverage presently being carried at the Embassy Dairy.

At the present time, insurance totaling $1,150,000 has been written by the Factory Insurance Association to cover, in a blanket fashion, the buildings, machinery and equipment, and personal property located on the premises. The coverage, of course, does not include vehicles. There is no co-insurance clause in the policy. It is generally understood that the insurance company will inspect the premises from time to time and will demand that sufficient insurance be carried to cover what it feels to be 90% of the insurable value of the property.

Mr. Richards has given us, in summary form, the results of an insurance appraisal conducted by the National Union Fire Insurance Company in Pittsburgh reporting the

sound value of all buildings to be $642,000. No insurance appraisal exists with respect to machinery and equipment. However, after deducting vehicles and certain duplicating items from the machinery and equipment appraisal submitted to the Bank in connection with the loan application, we believe that a figure of $800,000 would be the highest possible insurable value. We also have no firm figures on the plant inventory of supplies and products which are covered under this insurance policy. It appears that this value would be somewhere between $150,000 and $200,000. The maximum insurable value of the property covered under the master insurance policy is apparently in the neighborhood of $1,600,000. A 90% insurance policy would be $1,440,000.

In view of the fire proof type of building construction, sprinkler protection throughout the property, and in view of the distance separating portions of the property, it is inconceivable that the association could suffer one loss in excess of the present insurance. It is therefore the recommendation of the insurance broker that the association should not purchase any additional insurance until and unless required to do so by the insurance company.

The association is generally very well pleased with the operations of the Embassy Dairy since it has entered into the complete operation. Volume loss has been less than 200 gallons per day out of a total business of 20,000 gallons. With the exception of some very small dairies (Wakefield in particular) price discounting has disappeared from the Washington market. The association is still enmeshed in completing its final settlement with Embassy Dairy. Embassy has agreed to refund approximately $149,000 in various over-payments representing in particular uncollectible accounts receivable and missing or obsolete inventories for which the association had initially paid face value. The association is also disputing with Embassy concerning performance under that portion of the sales contract which required Embassy to deliver the identical machinery and equipment which was on hand April 1, 1954. The association claims that Embassy has replaced new vehicles with

[fol. 1721] older, less valuable ones and has made other changes in property to the detriment of itself as the buyer of this property. Mr. Hooper advised me that the total amount in dispute could reach as high as another $150,000 and that the association was determined to sue under the terms of the contract if an amicable agreement could not be reached.

Mr. Hooper also referred to a letter which he had written to me sometime ago concerning the desire of the association to modernize the truck fleet at Embassy. He advised me that this referred particularly to the association's desire to install refrigerating equipment in both wholesale and retail delivery equipment and said that he expected to accomplish this work gradually and finance it through the use of not more than 10% of the monthly "benefit payment" account being set aside.

Submitted by:

/s/ Jack R. Cobb
Jack R. Cobb
Assistant Treasurer

JRC:MVC

[fol. 1722]

Plaintiff's Exhibit 40

Memorandum

February 15, 1955

To: Mr. R. B. Jones, Jr., Treasurer

Re: Maryland & Virginia Milk Producers' Association, Inc.
Washington, D. C.

We have received the association's year-end statement at December 31, 1954. The audit will be copied in full into the printed annual report, and we will receive a copy of that report for our files when it is completed.

There is shown below a condensed balance sheet at December 31, 1954 as compared with December 31, 1953.

	12/31/53	12/31/54	Increase (Decrease)
Assets			
Current	$4,330,461	$4,595,650	$ 265,189
Fixed—Net	202,808	1,755,969	1,553,161
Other	40,000	2,111,371	2,071,371
Total	$4,573,269	$8,462,990	$3,889,721
Liabilities			
Current	$3,046,214	$3,609,081	$ 562,867
Term	—0—	2,886,694	2,886,694
Net Worth	1,527,05	1,967,215	440,160
Total	$4,573,269	$8,462,990	$3,889,721

The fixed assets acquired in Embassy Division have been valued at what the association considers to be a very conservative value, and the balance of the purchase price has been put into intangible assets. There is shown below a brief breakdown of fixed assets showing the dollar carrying value relating to Embassy and the dollar carrying value relating to other properties of the association.

Fixed Assets	
Embassy	$1,473,320
Other property	282,649
	$1,755,969

[fol. 1723] Other assets are detailed as follows:

"Other" Assets	
BBC Stock	$ 105,000
Members subscription notes on Certificate of Indebtedness	517,475
Good will	530,563
Unamortized cost of non-competitive agreement	958,333
Total	$2,111,371

The association believes that its good will valuation is conservative according to accepted practice and is a permanent asset of the association. The account entitled Unamortized cost of non-competitive agreement was originally $1,000,000 and is being written off at the rate of $100,000 per year over the ten year life of the agreement with Mr. Ward.

Current liabilities at December 31, 1954 included $550,000 due on term indebtedness during the year 1955. The balance of term debt due after December 31, 1955 is shown below.

Certificate of Indebtedness	$1,161,694
Due Baltimore Bank for Cooperatives	1,575,000
Commercial Banks	150,000
	$2,886,694

As of the present date, seven months after the purchase of Embassy Dairy, the association has anticipated payments on term debt as follows:

	Minimum Due	*Paid*	*Amount Anticipated*
Baltimore Bank for Cooperatives	$175,000	$275,000	$100,000
Commercial Banks	146,000	500,000	354,000
	$321,000	$775,000	$454,000

The association has, on February 11, repaid all of its indebtedness to commercial banks and intends to immediately commence substantially increasing its repayments to this Bank.

The net worth increase during the year totaling $440,160 may be analyzed generally as follows:

[fol. 1724] *Net Worth Increase*

Retained from operations of Embassy	$246,152
Financial income—transferred to Contingency Reserve	17,252

Supply Dept. net income—to reserve		6,659
Brokerage net income		236,942
Less: Net pool overpayment for year	$23,000	
Brokerage refunded to estates of deceased members	9,186	
Income tax—1953 and 1954	25,832	
Other Audit adjustments	8,827	(66,845)
		$440,160

The operating statement shows the results of the Embassy operation merged with other pooled sales of milk for members. The $246,000 figure which is shown as having been retained from Embassy operations is a net figure after charging Embassy for milk at the surplus price rather than upon a classified use basis. The total price adjustment between surplus and classified use amounted to $670,000 during the five month period. In other words, had Embassy Division been charged the classified price for milk, its operation would have returned a loss of $424,000 rather than a margin of $246,000. The association keeps complete subsidiary records on its Embassy operation and has full information on the operations. Included in the theoretical loss mentioned above are charges of $42,000 for write-off of the "non-competitive agreement" and of $82,000 for write-off of assets purchased which are considered worthless. This $82,000 figure is a non-recurring charge to operations. The $424,000 theoretic loss less $104,000 in charge-offs leaves a $320,000 theoretic operating loss which compares very closely with a total of $303,000 allowed by Embassy as price discounts during the five-month period.

It will be recalled that when the association took over Embassy it was committed under contract to a high volume of government and wholesale business at a very heavy price discount which carried through the first two months of operations (August and September). After completing these contracts, it was the association's intention originally

to gradually eliminate all price discount business and lead the way in removing price cutting from the Washington market. An initial attempt to do this was greeted with an immediate substantial loss of business, and the association decided that to maintain a reasonable volume at the plant it must meet competition. This type of competition is coming principally from Wakefield Dairy and there is, at present, no indication how long the condition will prevail in the Washington market. The association is concentrating on its retail business and offering price con- [fol. 1725] cessions on wholesale and contract business in order to maintain a reasonable volume through the plant. Three new retail routes have been established and the association is now running seventy-three retail routes and twenty wholesale routes. Volumewise, the business is about half retail and half wholesale.

There is shown below a summary of operating results in the Embassy Division for October, November and December, the months after the contracts entered into by the former owners of Embassy had been completed.

	October	*November*	*December*
Sales	$513,000	$521,000	$558,000
Less: Discount	52,000	53,000	52,000
Net Sales	$461,000	$468,000	$506,000
Undistributed Margin	$ 54,000	$ 84,000	$ 75,000
Milk Adjustment	$130,000	$159,000	$130,000
Theoretical Loss	$ 76,000	$ 75,000	$ 55,000
Average daily gallons	17,245	17,484	17,205
Operating costs as a percentage of sales	48.28%	46.44%	44.61%

Although the price discount has been the principal source of the theoretical loss at Embassy, the association feels that it has been able to accomplish considerable savings in operating costs as evidenced by the ratio of operating costs to sales. At present, the monthly operating loss just about

equals the amount of discount which is being granted. Mr. Hooper and Mr. Parks believe that they can further reduce operating costs by about $10,000 per month, but feel that that is about the limit insofar as plant economies are concerned. The primary reason for the purchase of Embassy was, of course, its effect upon the entire Washington market and upon the overall producer pool. This effect is difficult to compute in dollars and cents and, of course, is also theoretical. During the first seven months of 1954 the average pool return to all members was 39¢ per hundredweight less than in 1953. During the last five months of 1954 the average pool returns were 24¢ per hundredweight less than 1953. If this average gain of 15¢ per hundredweight were entirely attributed to the purchase of Embassy the total cash return to producers would be $386,000 in addition to the $246,000 retained capital at Embassy, or a total return of $632,000 on the investment for the five-month period. The argument that this decrease in spread between 1954 and 1953 can be attributed to Embassy is somewhat strength-
[fol. 1726] ened if we compare the Washington market with the returns of Maryland Cooperative Milk Producers in Baltimore where for the first seven months of 1954 the average return was 60¢ per hundredweight less than in 1953 and for four of the last five months (we do not readily have comparative figures for August) the average return was 68¢ per hundredweight less than 1953. As a matter of fact, the spread between Washington and Baltimore is becoming so great that the association has fears that Baltimore milk will start coming on the Washington market.

The association has recently filed a request for a Federal Market Order on milk in Washington. This was done primarily to insure that all milk coming into Washington is paid for at proper classified prices. The association feels that any further steps it might take on its own to straighten out the Washington market might be cause for restraint of trade proceedings from the Justice Department. It is anticipated that about eighteen months will elapse before any Federal Market Order might be established.

Jack R. Cobb
Assistant Treasurer

JRC/imd

[fols. 1727, 1728]

PLAINTIFF'S EXHIBIT 41

December 16, 1954

Mr. Harold D. Menken
Corotoman Farms
Upperville, Virginia

Dear Mr. Menken:

Thank you very much for your nice letter of December 2nd. I will try to answer a couple of your questions in this letter, but I hope to go over the whole picture with you when I get down the first of the year. I am also planning to bring Mr. M. Belmont VerStandig with me, who is heading our advertising program, and his very able and charming executive assistant, who in her spare time from the agency is Mrs. VerStandig.

With respect to the Embassy operation, Embassy is not, as of today, breaking even on a straight practical basis, utilizing the same price structure as we have set up in this Market. It is, of course, as you know, netting in profits to the producers close to $100,000 a month by moving the milk from surplus to fluid utilization. All of the loss at Embassy is a result of exorbitant discounts which we inherited when we took over the Dairy, and in which we have made considerable progress in adjusting these prices which are still much too heavy and will require a great deal more work. I would like to emphasis that it has to be handled in a most discreet and diplomatic manner or else, with two hungry independent dairies buying milk at a much lower price from local farmers, waiting to pounce on every dissatisfied customer, we could lose volume which would be extremely hard, if not impossible, to get back.

When Mr. VerStandig and I come down, we plan to spend several hours or more with you and would like very much to discuss the advertising program and get your views.

Very truly yours,

W. B. Hooper
Asst. Secretary-Treasurer

WBH/brt

cc: Mr. M. Belmont VerStandig

[fol. 1729]

HAROLD D. MENKEN
"COROTOMAN"
Upperville, Va.

December 2, 1954

Md & Va Milk Producers Association
1756 K St N.W.
Washington, D.C.

Attention
Mr. Derrick and
Mr. Hooper

Gentlemen:—

We certainly think you-all should have received a rising vote of thanks the other evening for providing such an interesting and informative evening.

There was one question I didn't get a chance to ask on which you might inform me—that is, Is Embassy operation paying its way—~~that~~ breaking even on current expenses—or losing much on current sales volume of 18,000 gals daily?

Many thanks for giving me a copy of the Milk Market Study. It should be very helpful in making future plans.

However, I would again like to emphasize the value of a similar study which should be made on Milk and its products from the angles of product development and presentation, packaging, point of sale methods, consumption habits and preferences, etc.

A lot has been done on the nutritional value, etc of Milk but very little on its presentation and use. Milk is one of the very few food products whose presentation has not been modernized and developed to specialized uses such as for example one type for youngsters and another for older folks, flavors colors, combination packages, etc.

The kind of study I am advocating would also develop some much more effective copy angles than anything that has been used to date.

I would like to compliment you and our Advertising Agency for the excellent start and foundation you have

made but I shall just state as the result of 20 years in the "profession" that the client who makes the most trouble and complaint gets the best campaign.

Hoping to see you all out here at Corotoman or at Charles Town, where incidentally, our Bright Fate broke the track record for 1 1/16th mile last year,

Cordially,

/s/ HAROLD D. MENKEN

Copy to Ed Norman

[fol. 1730]

PLAINTIFF'S EXHIBIT 42

September 9, 1954

MEMORANDUM TO: Mr. Remsberg

RE: Embassy Dairy

A. Executive and administrative personnel:

1. Managing Director-Treasurer, W. B. Hooper.
2. General Manager, J. Ridgely Parks, salary $20,000.
3. General Sales Manager, Charles Mason, salary $10,000.
4. Plant and Maintenance Superintendent, Vernon Parks, salary $15,000.
5. Wholesale Sales Manager, James Lawrence, salary $7,000.
6. Retail Sales Manager; Henry Myers, salary $6,500.
7. Director of Personnel and Safety, Vernon Doyle, salary $7,000.

B. Sales data:

1. Approximate daily volume (on a 6-day per week basis) 22,000 gallons per day.
2. Estimated dollar sales gross $540,000 for month of August.

3. Number of employees 317 (under Ward operation there were 347 employees).
4. Approximate loss in sales (volume) since date of operation, 170 gallons per day.

C. General information:

1. Final settlement with Ward scheduled for Monday in Baltimore. Adjustment due from Ward and which has been agreed upon $149,671.91—check to be received Monday.
2. Estimated producer benefit not reflected in blend price for the month of August $96,000 (this money to be used for curtailment of loan, no part of which is to be used for the payment of interest. Interest is to be charged to the Embassy operating costs.)

Note: Would like to recommend approval of a 10% retention each month of this benefit money in dairy operation for purpose of modernization of obsolete equipment and replacement of worn out trucks.

At this time we are unable to attempt to estimate the profit or loss for the August operation. We inherited discounts off regular list amounting to between 60 and 70 thousand dollars per month, as well as a large volume of contract milk which will run through September that in many cases is being sold under the contracts that Ward took at less than the Class I price but the dairy will be charged for this milk for the months of August and September. This alone may amount to as much as 25 to 30 thousand dollars. Effective Monday, September 6, the price of Green Valley milk which amounts to about 10,000 quarts per day, was [fol. 1731] increased ½¢ and discounts taken off. The average discount on this milk was around 10% although in some cases it was being sold as much as 20% off. As of the present moment, less than 10% of this has been lost as the

result of the price increase; however, we anticipate that as much as 40% may be finally lost due to the fact that when this milk is brought up to the same price as other advertised brands there will be a certain amount of switch from Green Valley, which is an off brand, to the recognized trade names of Chestnut and Thompsons.

There has been no great activity on the part of the other dairies to secure business from Embassy on an unethical basis except on the part of Wakefield Dairy, who have made a continued and all-out drive to secure business by innuendo against the Association, by false statements as to our operation and intent and by offering excessive discounts. To date we have been able to combat all of this with a loss of but very few customers. Retail business has increased and we have shown a gain in retail customers over that being served on August 1. It is hard to find out just where we stand on this gain until after the middle of September when all vacationers have returned and we can get on a steady customer basis.

Accounts receivable have been reduced from an average of 44 days' age to 42 days' age, with retail business averaging less than 28 days. This is a considerable improvement over the condition of the accounts when we took over August 1st. Golden Guernsey sales have increased from 500 quarts per day in July to a high of 1900 quarts last Friday. We expect that we will have the Golden Guernsey sales up to 2400 quarts per day by the end of September. This means that we will be selling more Golden Guernsey than all other dairies in the Washington area put together.

The organization is complete and functioning well as a unit. We have had no loss of personnel and the morale is excellent. The men seem to be pleased with their work and are backing the Management 100%. There is no dissatisfaction in any department. The Union is working along with us very well and is pleased with the way we are handling operations and we had a direct comment from Mr. Burdette of the Health Department that the plant had never been

in as good condition as it is at the present time. A survey two weeks ago by the U.S. Public Health Service resulted in a 94.5 score which is as high as any dairy has ever received in this city. Except for one minor item the dairy would have received a 98.5, that item being the lack of a sign in one of the washrooms stating that all employees should wash their hands before leaving the washroom, which cost 4 points on the score.

Reports from the telephone operators and from the solicitors and from the route men are that all comments that they have received relative to the product have been favorable and a number of people have gone out of their way to comment on the fine quality of the milk.

I and other members of the Management staff have made a point of visiting as many of the restaurants as possible and we can report that we have been well received and that [fol. 1732] again, comments on the products and service have been good. I also might comment that in only a very few instances have there been any adverse remarks relative to the Association's acquisition of the dairy.

In closing this memorandum I would point out that it is my observation which is based only on general and very incomplete observations and not on any actual figures, that the dairy will not show a profit for August and September due to the excessive amount of discount and below cost sales that were inherited. However, by the first of October the dairy should not only be able to make enough profits to cover the approximately $200,000 a year in interest that will be due on the loan but show very close to another $200,000 profits over and above that amount. The dairy buildings and equipment are in excellent shape; the trucks not so good and there will have to be considerable replacement of the retail trucks inasmuch as most of them are not worth the amount of money that it would cost to put them into first class condition. I would recommend that we have a replacement program on trucks at about 20 per year. These trucks cost about $4,000 each. There is also a fairly large future expenditure in changing the receiving room

around to take in producer milk in the quantity necessary. This can be done in the future after the dairy has more firmly established itself as to its financial condition and the need is not immediately pressing. There is also a large expenditure in the future of converting to refrigerated trucks from ice cooling on trucks. Again, this will be a gradual conversion and will not require any additional capital outlay but should be taken out of the dairy income and the money which is recommended to be set aside for modernization out of the benefits.

It is very important that a decision be made on the insurance, inasmuch as we cannot carry the binder as we are now carrying it on a temporary basis beyond October 1st, and permanent insurance will have to be set up by that time. I am attaching a proposal from the Aetna Insurance Company who is presently covering the dairy; a proposal from Travelers as represented by Mr. Paul Marsh, and I have been promised a proposal from both Farm Bureau and Liberty Mutual but they have not been received as of this writing. If they come in in time I will attach them. In commenting on this insurance I would like to call your attention to the fact that I have been advised in the event there are any differences between the Aetna and the Travelers Insurance Company, that Travelers would meet any quotations made by Aetna that are lower than the proposal by them. They have advised me of this through Mr. Marsh because they were working through rather incomplete information, whereas Aetna had complete information since they were carrying this insurance since 1949 and were in a better position to make accurate figures for the proposal.

W. B. Hooper

[fol. 1733]

PLAINTIFF'S EXHIBIT 43

December 1, 1954

MEMO TO: Mr. Blotch

RE: Embassy Purchase

Purchase consummated August 1, 1954

Total amount money allocated to Embassy operation 4 million dollars, of which 3 million 31 thousand went for the purchase of the real and physical assets of the dairy; 708 thousand for accounts receivable; 261,000 for working capital. Money was raised by:

1. Borrowing $2,100,000 from Baltimore Bank for Co-operatives, of which we received $1,995,000 in cash; 105 thousand being retained by the Bank for the purchase of stock in the Bank which will be retained when the loan is paid off.

2. $750,000 from local banks in the area.

3. $407,000 subscribed by producers in cash.

4. $748,000 borrowed from the Association's treasury.

In addition the membership subscribed in the form of notes deductible over a period of 24 months or less, the sum of $717,000. As these notes are paid off that money will be paid to replenish the Association's treasury and to supplement the dairy's payments to the banks for the reduction of debt.

A total of 1447 producers participated in the financing; 507 not participating.

Embassy volume when taken over 21,000 gallons per day

Present volume 18,600 gallons per day

Most of the drop in volume represented Government contracts undesirable from a price standpoint.

As of this date Association has reduced the indebtedness to the Bank by $412,500 and will further reduce it by another $300,000 by the end of the year. All of this money has come out of the dairy and represents the benefit to

[fol. 1734] the producer which has not been included in the current milk check, that is, the difference between the price which Embassy is charged for the milk and the Class III price, which is the price which is used in calculating the milk check and which would have been the price he received for that milk if Embassy had not been purchased, which means that this milk would have gone into surplus and brought that price. This money is held from the check and used for the reduction of debt is being credited to the individual producer accounts and each producer will be notified of the amount of that credit at the end of the year. The mode of notification has not yet been decided by the Board of Directors; that is, whether it will be by a Letter of Notification or Advice, or whether a Certificate in that amount will be issued.

Currently Embassy Dairy purchase has resulted in an increased milk check of about 12¢ per cwt. since August. This has been the result of various price adjustments that the Association has been able to make in some of their classification prices as the result of Embassy purchase.

Plaintiff's Exhibit 45

(See Opposite) ☞

Note

Pages 623 - 643 are on card 13

[fol. 1763]

PLAINTIFF'S EXHIBIT 110

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4482-56

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED,

Defendant.

STIPULATION No. 13

IT IS HEREBY STIPULATED AND AGREED by and between the United States of America and Maryland and Virginia Milk Producers Association, Incorporated, by their attorneys, subject to objections as to relevancy and materiality, that for the purposes of this cause the following may be found by the Court to be true:

1. During the period 1953 to 1957, inclusive, dealers other than dealers located in the Washington metropolitan area who sold fluid milk in the Washington metropolitan area were:

Aristocrat Dairy, Baltimore, Maryland
Kress Farm Dairy, Baltimore, Maryland
Excelsior Sanitary Dairy, Frederick, Maryland
Birmingham Dairy, Manassas, Virginia
Green Spring Dairy, Baltimore, Maryland
Rainiers' Dairy, Bridgeton, New Jersey
Cooklyn Division of Green Hill Dairy,
Goldsboro, Maryland

The foregoing dealers constituted all dealers located outside the Washington metropolitan area who sold fluid milk in the Washington metropolitan area during the period referred to above.

Pages 644 - 650 and 667 — 676 are on card 14

[fol. 1765]

PLAINTIFF'S EXHIBIT 114

Mr. Saunders
Mr. Waters
Miss Lingreen

BALTIMORE BANK FOR COOPERATIVES

FARM CREDIT DISTRICT NUMBER TWO

PENNSYLVANIA, DELAWARE, MARYLAND DISTRICT OF COLUMBIA, VIRGINIA, WEST VIRGINIA, PUERTO RICO

P. O. BOX 1636
BALTIMORE 3, MARYLAND

September 18, 1958

Victor R. Hansen, Assistant Attorney General
Antitrust Division,
United States Department of Justice,
Washington, D. C.

In re: United States v. Maryland and Virginia Milk Producers Association, Civil No. 4482-56

Your file: VRH:CLW
60-0-37-31

Dear Mr. Hansen:

I acknowledge receipt of your letter of September 12, 1958, in which, in connection with the above proceedings, you ask for certain information from this Bank's records and your questions are answered as follows:

1. QUESTION: Did the Baltimore Bank for Cooperatives, through its Executive Committee or otherwise,

a) authorize,
b) direct,
c) approve,

Italicized material handwritten.

d) declare or find to be in the public interest, or
e) sanction

the acquisition of assets of Embassy Dairy, Inc., by Maryland and Virginia Milk Producers Association?

ANSWER: No. The Bank did, however, approve and make a loan to the defendant, the proceeds of which were used in part to pay a portion of the purchase price of Embassy Dairy, Inc.

2. QUESTION: What action, if any, did the Baltimore Bank for Cooperatives, through its Executive Committee or otherwise, take on June 9, 1954, and June 23, 1954, respectively, with respect to Maryland and Virginia Milk Producers Association or its proposed acquisition of assets of Embassy Dairy, Inc.?

ANSWER: On June 9, 1954, the Bank approved a loan to the defendant subject to prior review and counsel by the Director of Cooperative Bank Service and concurrence of the Central Bank for Cooperatives. On June 23, 1954, having obtained the necessary clearance, the Bank took final action approving a loan to the defendant.

3. QUESTION: What was text or substance of such notification or notifications as were given Maryland and Virginia Milk Producers Association concerning the Bank's action? Please [fol. 1766] furnish a copy of such notification or notifications, if in writing.

ANSWER: The approval of the loan by the Bank to the defendant was evidenced as to the defendant by the execution and delivery of a written loan agreement and a letter of transmittal, three copies of each of which are attached hereto.

4. QUESTION: Please state the statutory authority for such action, if any, as was taken by the Bank with respect to Maryland and Virginia Milk Producers Association or its proposed acquisition of assets of Embassy Dairy, Inc.

ANSWER: The Farm Credit Act of 1933, as amended, and in particular 12 U.S.C. 1134c which provided as follows:

> "*Lending power.*—Subject to such terms and conditions as may be prescribed by the Farm Credit Administration, the banks for cooperatives are authorized (a) to make loans to cooperative associations as defined in subchapter VII of this chapter, for any of the purposes and subject to the conditions and limitations set forth in such subchapter; (b) to make loans (by way of discount or otherwise) to any bank organized under this subchapter; (c) to buy from, and sell to, any such bank or any Federal intermediate credit bank any note, draft, bill of exchange, debenture, or other obligation, or any interest therein; and (d) to borrow from, and discount or rediscount paper with, any and all such banks and commercial banks."

12 U.S.C. 1141e which provides as follows:

> "*Loans to cooperative associations.*—(a) Upon application by any cooperative association the administration is authorized to make loans to it from the revolving fund (provided for in section 1141d) to assist in—(1) the effective merchandising of agricultural commodities and food products thereof and the financing of its operations; (2) the construction or acquisition by purchase or lease, or refinancing the cost of such construction or acquisition, of physical facilities.

(b) No loan shall be made to any cooperative association unless, in the judgment of the administration, the loan is in furtherance of the policy declared in section 1141 of this title and the cooperative association applying for the loan has an organization and management, and business policies, of such character as to insure the reasonable safety of the loan and the furtherance of such policy.

(c) Loans for the construction or acquisition by purchase or lease of physical facilities, or for refinancing the cost of [fol. 1767] such construction or acquisition, shall be subject to the following conditions:

(1) No loan shall be made in an amount in excess of 60 per centum of the appraised value of the security therefor.

(2) No loan for the purchase or lease of such facilities shall be made unless the Governor of the Farm Credit Administration finds that the purchase price or rent to be paid is reasonable.

(d) Loans for the construction or purchase of physical facilities, together with interest on the loans, shall be repaid upon an amortization plan over a period not in excess of twenty years."

5. QUESTION: Please state the relation of the Baltimore Bank for Cooperatives as of June 9, 1954, and June 23, 1954, respectively, to the Department of Agriculture, and the authority and duties, if any, of the Bank exercised as of such dates by virtue of delegation from the Secretary of Agriculture.

ANSWER: On the dates mentioned the regional banks for cooperatives operated under the general

supervision of the Farm Credit Administration which was and still is an independent agency in the Executive Branch of the Government. Historically, effective May 27, 1933, the Farm Credit Administration was originally established as an independent agency by Executive Order No. 6084. Effective July 1, 1939, it was transferred to the Department of Agriculture by 1939 Reorganization Plan No. 1, section 401; 4 F.R. 2730; 53 Stat. 1429. Effective December 4, 1953, however, by the provisions of the Farm Credit Act of 1953, the Farm Credit Administration was reconstituted under the direction and supervision and control of the Federal Farm Credit Board and was reestablished as an independent agency in the Executive Branch of the Government.

6. QUESTION: Did the Baltimore Bank for Cooperatives undertake to consider whether the acquisition of the assets of Embassy Dairy, Inc., by Maryland and Virginia Milk Producers Association was in the public interest as contrasted with the interest of the cooperative or the Bank, or undertake to consider whether the extension of credit to Maryland and Virginia Milk Producers Association to finance such acquisition was in the public interest as contrasted with the interest of the cooperative or the Bank?

ANSWER: No. However, in approving this loan the Bank did comply with the provisions of 12 U.S.C. 1141 by making the necessary determination that the loan would be in furtherance of the policy declared by the Congress in 12 U.S.C. 1141a.

You are correct in your understanding that the only connection of the Baltimore Bank for Cooperatives with the

Embassy acquisition was in the Bank's capacity as a source of credit to the defendant.

[fol. 1768] The Bank is pleased to cooperate with your office in the performance of your official duties and will be glad to furnish you any additional information concerning its lending activity as related to the above defendant.

Very truly yours,

/s/ R B Jones Jr

R. B. Jones, Jr.
President

[fols. 1769, 1770]

P.O. Box 1636

June 23, 1954

Mr. B. B. Derrick, Secretary-Treasurer
Maryland and Virginia Milk Producers' Association, Inc.
1756 K Street, N. W.
Washington 6, D. C.

Dear Mr. Derrick:

There is attached in duplicate loan agreement No. O & F-1320 providing for operating capital and facility loans totaling $2,100,000. Many of the provisions of the loan agreement have been discussed informally with you and Mr. Hooper. However, if you so desire, we will be pleased to try to answer any questions which you may have concerning this loan agreement. If, after careful study, the loan agreement is deemed acceptable by the association, will you please have it executed on behalf of the association in the space provided and return the original copy to this Bank. The duplicate copy is for the association's files.

In addition to the security documents to be delivered upon settlement date, will you please arrange to have all fire insurance policies covering the mortgaged property en-

dorsed with a standard form of mortgagee clause in favor of this Bank in order that the insurance policies may be delivered upon settlement date.

We are very pleased to have the opportunity to be of service to the association.

Very truly yours,

Jack R. Cobb
Assistant Treasurer

Enclosure.
JRC:IVC

[fol. 1771]

BALTIMORE BANK FOR COOPERATIVES

LOAN AGREEMENT

No. O & F-1320

Date June 23, 1954

Re: Maryland and Virginia Milk Producers' Association, Inc., Washington, D. C.

$1,150,000	Facility Loan
950,000	Operating Capital Loan
$2,100,000	Total Loans

The findings required by law having been duly made, the Baltimore Bank for Cooperatives agrees to make loans to the above-named cooperative association upon the following terms and conditions:

AMOUNT:

Not to exceed:

$1,150,000	Facility Loan
950,000	Operating Capital Loan
$2,100,000	Total Loans

INTEREST:

Each advance made hereunder shall bear interest at the rate prescribed in accordance with law, payable monthly.

PURPOSE:

The proceeds of loans, supplemented by the association's own funds and funds borrowed from its members and from commercial banks, shall be used to make payment in full for physical facilities and personal property being purchased from Embassy Dairy, Inc., Washington, D. C. under the terms of a contract of sale dated May 26, 1954; also for the purchase of such stock in the Bank as the association is required by law to own which stock shall be held by the Bank as security for all indebtedness of the association to the Bank.

NOTES AND SECURITY:

Advances made hereunder shall be evidenced by a promissory note, or notes, acceptable to the Bank and shall be secured by a first deed of trust (mortgage), insured by an acceptable policy of title insurance, covering all land, buildings, machinery and equipment being acquired from Embassy and located at, or near, 1615 First Street, N. W., Washington, D. C. and at, or near, Alexandria, Virginia, and covering land, and buildings comprising the association's farm supply warehouses near Frederick, Maryland, and the note shall also be secured by an assignment of certain leases being acquired from Embassy Dairy covering payed parking lots and a dry storage warehouse.

The association agrees that it will not, without prior approval of the Bank, pledge or hypothecate any of its assets and that it will, upon demand of the Bank, pledge as additional security for loans hereunder such of its assets in such form and manner as the Bank may require.

ADVANCES:

Upon delivery of the security required, not to exceed $1,750,000 may be advanced by the Bank of which sum $1,150,000 shall be classified as a facility loan and $600,000 shall be classified as operating capital loan.

Upon determination by audit of the purchase price of trade accounts receivable and product and supplies inventory from Embassy Dairy, Inc. as provided for in the sales contract, not to exceed $350,000 or fifty percent (50%) of the purchase price of these assets, whichever amount is less, may be advanced by the Bank and shall be classified as an operating capital loan.

[fol. 1772] REPAYMENT:

All advances made hereunder shall be repaid by monthly installments of not less than $25,000 due on the twentieth day of each month commencing September 20, 1954.

In addition to minimum monthly payments specified above, the association shall remit to the Bank for credit to the loans on or before March 20 of each year, commencing March 20, 1955, an amount equivalent to 50 percent of net additions to capital accounts in excess of $300,000 during the preceding fiscal year.

Repayment shall be applied first to operating capital loans and then to facility loans.

The Treasurer of the Bank is directed to demand payment of any balance outstanding hereunder on August 20, 1961.

EXPIRATION:

Any unadvanced portion of this commitment shall be canceled on August 31, 1954, provided that the Bank may at its option and without notice extend said cancelation date for such period or periods of time as the Bank shall, in its sold discretion, determine.

CONDITIONS:

While this loan agreement is in effect, the association will:

(a) Maintain its status as a cooperative association as defined by the Farm Credit Act of 1935.

(b) Furnish such information as the Bank may request relative to its affairs, and permit such examination of its books and records as the Bank may specify.

(c) Maintain insurance, covering such risks, in such companies, forms and amounts, and fidelity bond coverage in such companies, forms and amounts on such officers and employees, as the Bank may request.

(d) Maintain management and business policies satisfactory to the Bank, and promptly make such changes therein as the Bank may from time to time request in writing.

(e) Declare or pay cash dividends, or make any cash distribution of capital or patrons' equities, only upon written approval of the Bank.

(f) Obtain loans from other lenders only upon written approval of the Bank. Permission is hereby granted the association to borrow not in excess of $250,000 for short-term working capital purposes between July 1, 1954 and September 30, 1954.

(g) Maintain a credit policy satisfactory to the Bank.

SPECIAL CONDITIONS:

The association further agrees:

(1) Prior to receiving any advances hereunder, the association shall submit evidence to the Bank that it has available $1,500,000 in cash funds arising from operating capital owned by the association and from the sale to members of 5 percent certificates of indebtedness, callable in 5 years and maturing in 12 years, and that it has commitments from commercial banks who shall have agreed to lend

not more than $500,000 evidenced by unsecured promissory notes of the association payable in 12 equal quarterly installments.

(2) The association's board of directors agrees to recommend to its membership for adoption not later than at its next annual meeting such changes, amendments or additions to its charter, bylaws, and marketing agreement, as may appear to the Bank and to the association's attorney to be desirable.

[fol. 1773] (3) Not later than immediately after the association's regular monthly board meeting in the month of July, 1954 the association shall supply the Bank a certified copy of a resolution, in form and substance acceptable to the attorney for the association and to the attorney for the Bank, adopted at that meeting by the association's board of directors for the purpose of setting forth the obligation of the association to account to its patrons for all funds received in excess of the cost of doing business.

(4) The association agrees to continue its efforts to sell its members five percent (5%) certificates of indebtedness maturing in twelve years and callable at the option of the board after five years, until the sum of at least $1,750,000 has been paid or subscribed, provided subscriptions are accompanied by a note authorizing payment to be deducted from members' milk checks.

(5) In accepting this loan contract, the association binds itself during the life of the loan agreement to increase its capital funds, through retained margins or otherwise, by at least $300,000 annually.

DEFAULT:

If any representations heretofore or hereafter made by or on behalf of the association to the Bank shall prove false or if the association shall breach any of its

obligations or agreements in connection herewith, the Bank may immediately declare all indebtedness arising hereunder due and payable and exercise all rights and remedies for the collection thereof.

ACCEPTANCE:

This agreement shall not become effective unless the association shall, within thirty days from date, signify its acceptance of the terms and conditions hereof by signing and returning a copy of this agreement to the Bank.

BY DIRECTION of the Executive Committee, this 23rd day of June, 1954.

BALTIMORE BANK FOR COOPERATIVES

By /s/ S. M. THOMSON
S. M. Thomson, President

ACCEPTED AND AGREED TO:

MARYLAND AND VIRGINIA MILK PRODUCERS' ASSOCIATION, INC.

By /s/ B. B. DERRICK
Its Secy-Treas

Date July 1 1954

[fol. 1775]

PLAINTIFF'S EXHIBIT 120

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4482-56

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED,

Defendant.

STIPULATION No. 11

It is hereby stipulated and agreed by and between the United States of America and the Maryland and Virginia Milk Producers Association Inc., by their attorneys for the purposes of this case that neither party will contest the accuracy of the data contained in the tables annexed hereto and designated A through T inclusive, Provided, however, that such tables and the computations and figures contained therein shall not be offered in evidence except thru a live witness who shall be subject to cross examination not inconsistent with this stipulation.

/s/ JOSEPH J. SAUNDERS
Attorney for the United States

/s/ HERBERT A. BERGSON
Attorney for Maryland and Virginia Milk Producers Association

[fol. 1786]

PLAINTIFF'S EXHIBIT 120

Table K

SALES OF FLUID MILK IN THE WASHINGTON METROPOLITAN AREA BY ALL DEALERS LOCATED IN SAID AREA.
(May-Dec., 1953)
(All Non-Percentage Figures in Thousands of Pounds. All Percentage Figures Relate to Grand Total.)

Dairies	*Net Sales*	*Percent*
Embassy	33,725	9.9
Alexandria	26,710	7.8
Golden Rule	2,577	0.8
Lucerne	47,422	13.9
Thompson's	59,822	17.5
Chestnut Farms	132,332	38.6
Wakefield	15,204	4.4
Martin's	2,730	0.8
Richfield	6,286	1.8
High's	4,492	1.3
Hadley	—	—
Sunrise	—	—
Harvey	10,813	3.2
TOTAL	342,113	100.0

[fol. 1787]

PLAINTIFF'S EXHIBIT 120

Table L

SALES OF FLUID MILK IN THE WASHINGTON METROPOLITAN AREA BY ALL DEALERS LOCATED IN SAID AREA. 1954
(All Non-Percentage Figures in Thousands of Pounds. All Percentage Figures Relate to Grand Total.)

Dairies	*Net Sales*	*Percent*
Embassy	55,175	10.6
Alexandria	43,055	8.2
Golden Rule	4,581	0.9
Lucerne	70,929	13.6
Thompson's	90,033	17.3
Chestnut Farms	193,103	37.0
Wakefield	25,324	4.9
Martin's	4,330	0.8
Richfield	10,686	2.0
High's	7,230	1.4
Hadley	725	0.1
Sunrise	—	—
Harvey	16,735	3.2
TOTAL	521,906	100.0

[fol. 1788]

PLAINTIFF'S EXHIBIT 120

Table M

SALES OF FLUID MILK IN THE WASHINGTON METROPOLITAN AREA BY ALL DEALERS LOCATED IN SAID AREA, 1955
(All Non-Percentage Figures in Thousands of Pounds. All Percentage Figures Relate to Grand Total.)

Dairies	*Net Sales*	*Percent*
Embassy	56,335	10.2
Alexandria	47,131	8.5
Golden Rule	5,286	1.0
Lucerne	69,463	12.5
Thompson's	92,199	16.6
Chestnut Farms	199,529	36.0
Wakefield	30,469	5.5
Martin's	4,710	0.9
Richfield	9,503	1.7
High's	15,192	2.7
Hadley	963	0.2
Sunrise	469	0.1
Harvey	22,710	4.1
TOTAL	553,959	100.0

[fol. 1789]

PLAINTIFF'S EXHIBIT 120

Table N

SALES OF FLUID MILK IN THE WASHINGTON METROPOLITAN AREA BY ALL DEALERS LOCATED IN SAID AREA. 1956
(All Non-Percentage Figures in Thousands of Pounds. All Percentage Figures Relate to Grand Total.)

Dairies	*Net Sales*	*Percent*
Embassy	54,177	9.5
Alexandria	45,920	8.1
Golden Rule	6,474	1.1
Lucerne	69,108	12.1
Thompson's	97,004	17.1
Chestnut Farms	193,943	34.2
Wakefield	38,836	6.8
Martin's	4,718	0.8
Richfield	—	—
High's	27,669	4.9
Hadley	1,358	0.2
Sunrise	1,658	0.3
Harvey	27,925	4.9
TOTAL	568,790	100.0

[fol. 1790]

PLAINTIFF'S EXHIBIT 120

Table O

SALES OF FLUID MILK IN THE WASHINGTON METROPOLITAN AREA BY ALL DEALERS LOCATED IN SAID AREA. 1957
(All Non-Percentage Figures in Thousands of Pounds. All Percentage Figures Relate to Grand Total.)

Dairies	*Net Sales*	*Percent*
Embassy	59,928	10.2
Alexandria	50,987	8.7
Golden Rule	8,010	1.4
Lucerne	70,859	12.0
Thompson's	98,918	16.8
Chestnut Farms	181,381	30.7
Wakefield	38,809	6.6
Martin's	5,440	0.9
Richfield	—	—
High's	41,412	7.0
Hadley	1,267	0.2
Sunrise	3,867	0.7
Harvey	28,346	4.8
TOTAL	589,224	100.0

[fol. 1791]

PLAINTIFF'S EXHIBIT 120

Table P

SALES OF FLUID MILK (Excluding Cream and Cottage Cheese) IN THE WASHINGTON METROPOLITAN AREA BY ALL DEALERS LOCATED IN SAID AREA. (May-Dec., 1953)
(All Non-Percentage Figures in Thousands of Pounds. All Percentage Figures Relate to Grand Total.)

Dairies	*Net Sales*	*Percent*
Embassy	30,351	10.4
Alexandria	25,034	8.6
Golden Rule	2,365	0.8
Lucerne	38,603	13.2
Thompson's	51,812	17.8
Chestnut Farms	106,886	36.7
Wakefield	13,617	4.7
Martin's	2,438	0.8
Richfield	5,444	1.9
High's	4,268	1.5
Hadley	—	—
Sunrise	—	—
Harvey	10,366	3.6
TOTAL	291,184	100.0

[fol. 1792]

PLAINTIFF'S EXHIBIT 120

Table Q

SALES OF FLUID MILK (Excluding Cream and Cottage Cheese) IN THE WASHINGTON METROPOLITAN AREA BY ALL DEALERS LOCATED IN SAID AREA. 1954
(All Non-Percentage Figures in Thousands of Pounds
All Percentage Figures Relate to Grand Total.)

Dairies	*Net Sales*	*Percent*
Embassy	49,657	11.0
Alexandria	39,899	8.9
Golden Rule	4,290	0.9
Lucerne	60,088	13.4
Thompson's	79,201	17.6
Chestnut Farms	158,446	35.2
Wakefield	21,164	4.7
Martin's	3,901	0.9
Richfield	9,816	2.2
High's	6,869	1.5
Hadley	711	0.2
Sunrise	—	—
Harvey	15,899	3.5
TOTAL	449,941	100.0

[fol. 1793]

PLAINTIFF'S EXHIBIT 120

Table R

SALES OF FLUID MILK (Excluding Cream and Cottage Cheese) IN THE WASHINGTON METROPOLITAN AREA BY ALL DEALERS LOCATED IN SAID AREA. 1955

(All Non-Percentage Figures in Thousands of Pounds. All Percentage Figures Relate to Grand Total.)

Dairies	*Net Sales*	*Percent*
Embassy	51,881	10.8
Alexandria	43,751	9.1
Golden Rule	4,846	1.0
Lucerne	60,258	12.5
Thompson's	80,944	16.8
Chestnut Farms	165,315	34.3
Wakefield	24,454	5.1
Martin's	4,223	0.9
Richfield	8,044	1.7
High's	14,446	3.0
Hadley	944	0.2
Sunrise	447	0.1
Harvey	21,533	4.5
TOTAL	481,086	100.0

[fol. 1794]

PLAINTIFF'S EXHIBIT 120

Table S

SALES OF FLUID MILK (Excluding Cream and Cottage Cheese) IN THE WASHINGTON METROPOLITAN AREA BY ALL DEALERS LOCATED IN SAID AREA. 1956
(All Non-Percentage Figures in Thousands of Pounds. All Percentage Figures Relate to Grand Total.)

Dairies	*Net Sales*	*Percent*
Embassy	49,727	10.0
Alexandria	42,671	8.6
Golden Rule	6,010	1.2
Lucerne	61,321	12.3
Thompson's	84,839	17.0
Chestnut Farms	162,526	32.8
Wakefield	30,543	6.1
Martin's	4,219	0.8
Richfield	—	—
High's	26,286	5.3
Hadley	1,332	0.3
Sunrise	1,610	0.3
Harvey	26,528	5.3
TOTAL	497,612	100.0

[fol. 1795]

PLAINTIFF'S EXHIBIT 120

Table T

SALES OF FLUID MILK (Excluding Cream and Cottage Cheese) IN THE WASHINGTON METROPOLITAN AREA BY ALL DEALERS LOCATED IN SAID AREA. 1957
(All Non-Percentage Figure in Thousands of Pounds. All Percentage Figures Relate to Grand Total.)

Dairies	*Net Sales*	*Percent*
Embassy	52,972	10.3
Alexandria	47,044	9.2
Golden Rule	7,651	1.5
Lucerne	62,675	12.2
Thompson's	85,450	16.7
Chestnut Farms	149,428	29.3
Wakefield	31,368	6.1
Martin's	4,493	0.9
Richfield	—	—
High's	39,354	7.7
Hadley	1,239	0.2
Sunrise	3,812	0.7
Harvey	26,805	5.2
TOTAL	512,291	100.0

[fols. 1796, 1797]

DEFENDANT'S EXHIBIT 18

APPROVED BUREAU OF THE BUDGET
FORM NO. 40-R937

(Stamp)

BALTIMORE BANK FOR COOPERATIVES
24TH AND ST. PAUL STS.
BALTIMORE, MARYLAND

APPLICATION FOR LOAN

Date June 1, 1954

1. Name of applicant Maryland and Virginia Milk Producers Association, Inc.

2. Address of applicant 1756 K Street N.W., Washington 6, D.C.

Applic. No. 1429

3. Amount applied for $3,000,000.00

4. Applicant will use the loan, if made, for the following specific purposes *(and for none other except with the prior written consent of the bank):* Purchase the assets and goodwill of Embassy Dairy, Inc.

5. Applicant offers the following as security for the loan: See attached sheet

Applicant states that there are no liens on any part of such property except taxes not now delinquent, and the following: none

6. If a loan is granted, applicant will repay the loan in the following manner:

Facilities loan: 8 yrs equal annual installments.
Operations loan: 4 yrs—1st Install. 25% at end of 2 yrs; 25% 3rd year; balance 4th year.

7. Is applicant involved in any litigation? no. *(If "Yes" describe fully on separate sheet.)*

8. Does applicant sell supplies? yes If "*Yes*" what percentage of supplies sold is for strictly agricultural purposes? 100%

9. Please supply the following information regarding members, voting rights, and business transacted by your association during the year ended Dec. 31, 1953 *(Last fiscal year)*. Only persons or organizations with a right to vote in the affairs of the association should be classed as members.

(a) Members: Our association has 1917 members who possess the right to vote. Of this number 1917 are farmers *(including landlords, tenants and farming companies)*: none are non-farmers; none are farmers' cooperative associations; and none are other organizations. If your association has as members farmers' cooperatives or other organizations, list their names and addresses on a separate schedule.

(b) Voting rights: *(To be filled out if your members possess more than one vote each)* The members of our association possess a total of ..... votes, of which farmers have ..... votes; non-farmers ..... votes; cooperative associations ..... votes; and other organizations ..... votes.

(c) Business transacted during the last fiscal year amounted to $35,074,718.73, of which $35,074,718.73 was transacted with or for farmer members, and with or for members which are farmers' cooperative associations; $ none with or for members who are non-farmers; and $ none with or for non-members.

10. Is applicant a member or stockholder of any organization? yes *(If "Yes" state names of such organizations and the nature of the affiliation.)* 36 Shares Common Stock-Western Md. Trust Co., Fred., Md. Member: Natl. Milk Prod. Fed.; Northeastern Dairy Conference; Atlantic Dairy Association

11. Applicant attaches hereto, as part of this application, the exhibits specified on the following page and agrees to submit annually to the bank and at such other times as the bank may require, a statement of its condition, in form approved by the bank, and said

applicant further agrees that the bank may, at any time while it is indebted to the bank, examine its books, records, and accounts.

12. All statements herein and in the exhibits attached, including answers to questions and statements heretofor or hereafter submitted to the bank by applicant in connection with this loan, are statements of fact and representations made for the purpose of obtaining the loan and are warranted correct, and the undersigned officer of the association, authorized by a resolution adopted by applicant's board of directors, executes this application and agrees that he has full knowledge of the provisions of section 64(a) of the Farm Credit Act of 1933, *(see below)*, and has made the representations and statements contained in this application and other documents herewith or hereafter submitted for the purpose of influencing the action of the Farm Credit Administration, the bank, or officials of either of them.

Maryland and Virginia Milk Producers Association, Inc.
(Applicant)

By /s/ B. B. DERRICK
B. B. Derrick
Its Treasurer

ATTEST:

/s/ W. B. HOOPER
Ass't. (Secretary)
W. B. Hooper

(Affix corporate seal here)

Section 64(a) of the Farm Credit Act of 1933:

"Whoever makes any material representation knowing it to be false, or whoever wilfully overvalues any property or security, for the purpose of influencing in any way the action of the Farm Credit Administration or any division, officer, or employee thereof, or of any corporation organized under this Act, or in which a Production Credit Cor-

poration organized under this Act holds stock, or of any regional agricultural credit corporation established pursuant to subsection (e) of section 201 of the Emergency Relief and Construction Act of 1932, upon any application, advance, discount, purchase or repurchase agreement, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both."

[fol. 1798]

(Letterhead of Maryland and Virginia Milk Producers Association, Inc., Washington 6, D. C.)

No. 1429

SUPPLEMENTAL INFORMATION FOR
APPLICATION FOR LOAN
BALTIMORE BANK FOR COOPERATIVES

Dated June 1, 1954

Item No. 5—Applicant offers the following as security for the loan:

1. All assets of the Association except Cash on Hand, Bonds, and Office Land and Building, amounting to $3,505,633.87.

2. Assets of Embassy Dairy, Inc. as follows:

   a. Dairy Equipment, Automotive Equipment, and other current assets except Accounts Receivable and revolving inventories; appraisal value $1,319,171.00 per attached appraisal.

   b. Land and Buildings amount to $ ..... per attached appraisal.

[fol. 1799]
(Letterhead of Maryland and Virginia Milk Producers Association, Inc., Washington 6, D. C.)

6-1-54

Item. No. 6—Statement showing volume of business in terms of value and units for each of last three years Association

	Dollar value milk sold	*Total lbs. milk sold*
1951	$29,909,109.64	505,553,036
1952	32,984,562.11	531,749,249
1953	34,255,364.55	596,422,556

In addition, dairy equipment sales to farmer members:

	Dollar Value
1951	$504,495.69*
1952	760,593.22*
1953	853,724.49*

* Does not include direct-ship purchases by members.

[fol. 1800]

DEFENDANT'S EXHIBIT 19

SECRETARY'S REPORT

June 8, 1954

To: Executive Committee

From: Jno. B. Jones, Secretary

Applicant: Maryland and Virginia Milk Producers Association, Incorporated
Washington 6, D. C.

Application No. 1429, dated June 1, 1954, for $3,000,000

The Association has not previously applied to the Bank.

I. HISTORY

A. *The Need for Cooperative Effort.* As has been the case with most successful organizations of this type, the organization of the milk producers in the Washington market resulted from the existence of a definite and pronounced economic need—in this instance arising from:

1. Market insecurity—for the producer and for the distributor.
2. Needless price fluctuations—again, to the detriment of both the producer and the distributor.
3. Mal-distribution of surplus milk—to the disadvantage of the producer and the distributor.
4. Complete lack of bargaining power on the part of the producers.
5. Generally chaotic conditions in the production and distribution of fluid milk for which there was a steadily increasing and stable demand in the Washington Metropolitan area.

Such conditions, of course, are not conducive to the investment, labor, know-how, and business risks involved in the production of a dependable supply of high quality milk—and, therefore, are not in the best interests of the producer, the distributor, or the consumer.

B. *A First Attempt at Organization.* In 1904, the "Milk Producers' Association of Maryland, Virginia and District of Columbia" was incorporated under the laws of the District of Columbia. This was purely a bargaining association; fairly successful at first in strengthening the price level through conferences with distributors. While some members were radically inclined and advocated strikes, the conservative element was in the majority, and strikes were avoided. The Association did not charge any brokerage fee nor accept any responsibility for members' milk. It was merely a bargaining club, lacking in effective bargaining power as it had no financial resources. This experience doubtless paved the way for what was to follow, and the urge for a more effective association resulted in the formation of

C. *The Subject Association.* An Association booklet, published in 1944, gives the following interesting summary of its history to that date (following the comments on its predecessor):

[fol. 1801] "It was not until 16 years later that a strong and effective Association was formed. On September 21, 1920, the Maryland and Virginia Milk Producers' Association, Inc., was incorporated as a non-profit corporation under the general corporation laws of Maryland. On October 5, 1923, the organization was converted into a cooperative Association under the cooperative laws of Maryland. The purpose of this Association as given in the articles of incorporation were:

"1. To encourage better and more economical methods in producing dairy products.

"2. To secure better results in marketing and advertising our products.

"3. To develop our markets and find new ones for our products.

"4. To buy supplies in a cooperative way.

"5. To rent, buy, own, sell and control such property as may be needed in the business.

"6. To own, lease, and operate storage and packing warehouses.

"7. To arrange for the transportation and handling of our products in the best possible manner.

"8. To cultivate a cooperative spirit among dairymen.

"9. To perform any other work which may tend to the betterment of the members and the promotion of our industry.

"From such a list of objectives, it is evident that the dairymen had formed this new organization to be considerably more than a bargaining job. The Association employed a manager and signed up a large number of producers on a membership contract. The brokerage fee at first was one-fifth of a cent per gallon. On July 1, 1921, this fee was raised to one cent per gallon. The Association borrowed $45,000.00 from its members by issuing certificates of indebtedness and began operating a surplus plant in August 7, 1921. A month after this plant opened, the dealers called a strike—the first and only one in 23 years of marketing. Members were instructed to withhold one-third of their supply from the fluid market in order to force the dealers to pay a higher price. The dealers retaliated and refused to accept any milk from members which threw virtually all the members' milk into the Association's surplus plant. At the end of three weeks, the Association could no longer stand the financial losses and notified its members shipping to the plant that the Association could not accept the responsibility for their milk and that it was necessary for them to try to place their milk with the dealers.

"This was a body blow to the new and struggling organization as many members withdrew and refused to support the Association.

[fol. 1802] "Undoubtedly the early founders realized they did not have sufficient volume and proceeded to do something about it. Early in 1922, the Association began re-signing producers on a pooling contract that was not to become binding until enough producers had signed to control at least 85 per cent of the market's milk supply. In order to be able to take care of the milk if dealers refused to cooperate, the Association built a plant in Frederick, Maryland. By September 1923, this plant was ready and on October 1, 1923, enough producers had signed the pooling contract to make it effective.

"Some dealers refused to accept members' milk under the new set-up and that milk was diverted to the Association's plants at Frederick and in Washington. This time the Association weathered the storm because they had sufficient volume and the contracts with members were binding. However, the financial strain was heavy from handling the milk the dealers would not take. By July 31, 1924, the Association's indebtedness was over $108,000.00. To help carry these losses the brokerage fee had been raised to four cents per gallon. On October 1, 1924, the brokerage was reduced to three cents per gallon and on October 1, 1925, it was reduced to two cents. On October 1, 1926, a new producer contract became effective in which the brokerage was limited to one cent per gallon. It has been one cent ever since. (It is only one-half a cent for members delivering to receiving stations).

"On April 1, 1927, the Association's two surplus plants were closed because the Association was able to make satisfactory arrangements for the handling of surplus with the dealers. Later the Association sold the plant at Frederick and surrendered the lease on the Washington plant selling the equipment. Since that time, the Association has not owned or operated any surplus plants."

(following quote from January, 1938, booklet) "After the closing of the surplus plants, the Association grew rapidly and with direction, but it was not until 1931 that the Association had really reached a secure and formidable place in the market. By December 31, 1930, the Association had a reserve fund of over $271,000.00 compared with a deficit of over $108,000.00 as of July 31, 1924."

(again quoting from 1944 booklet) "By December 31, 1935, the Association had a reserve fund of over $435,000.00 * * * The reserve fund on July 31, 1944 was $1,147,189.28. The total volume of milk handled by the Association grew from 8,551,857 gallons in 1924 to 22,036,646 gallons in 1932 and 40,702,975 gallons in 1943. Since 1931, Association members have supplied between 85 and 90 per cent of Washington's milk supply."

It appears that as the years have gone by, the Association has increasingly endeavored, with very good results, to accomplish the objectives and purposes enumerated in its articles of incorporation. Among the tangible services rendered by the Association are:

[1803] 1. Maintenance of a sound price level.

Now the members have just one salesman—the Association. By positive persuasion backed by the loyalty of its members (under firm marketing agreements) and by economic facts, the Association has been successful in this endeavor. The policy has been to keep price objectives in line with economic conditions, with no attempt to force prices up when not justified by supply and demand conditions.

2. Guarantee of ultimate payment for milk.

Acting as agent for its members the Association guarantees full payment for all marketable milk delivered by all members at all times and under any and all conditions. This guarantee has never failed and is backed up by a reserve fund of over one million dollars.

3. Guarantee of a market for all milk.

   This has never failed—for all marketable milk.

4. Checking weights and butterfat tests.

   This service has been of real value to the producers.

5. Maintenance of an effective field force.

   To keep in close touch with all members in the interest of more efficient production of high quality milk, and to keep them informed of the Association's activities.

6. Purchasing supplies and equipment.

   Principally dairy barn equipment and supplies procured by the Association and distributed through its supply warehouse at Frederick, Maryland.

7. Direct payment for milk.

   Since February 1935, the Association has collected all sales proceeds and calculated the blend prices and monthly accounts and paid the members from its own office.

8. Handling surplus.

   The Association does not own a surplus plant, but it does sell and accept as agent for its members the responsibility for all the milk or cream the dealers do not want for fluid use.

9. Regulating supplies of milk from farms to dealers.

   To regulate the supply among dealers and to facilitate delivery, etc.

[fol. 1804] 10. Hauling milk to market.

   The Association does not own trucks or have contracts with the transportation companies that haul members' milk from the farm to city, but is very active in facilitating hauling arrangements and increasing hauling efficiency.

11. Dissemination of news and information.

   A good job—both marketwise and on Association's activities.

12. Representation of members, as dairymen, before governmental and other bodies.

    Again—an aggressive and effective job being done.

13. Cooperation with other farm organizations, such as National Cooperative Milk Producers' Federation, National Council of Farmer Cooperatives, etc.

That the above program of operation has been effective is strongly indicated by the Association's steady growth, as evidenced by the summary for the 26-year period 1928-1953 attached hereto as EXHIBIT "A".

D. *Proposal to Purchase Embassy Dairy, Inc.*: We are informed that this is the only major dairy in Washington that does not have a supply contract with the Association; and that it has always looked elsewhere for its supply.

In a recent "Washington Area Milk Market Study", prepared for the Association, a sample of the market indicates that the following dairies are serving the stated percentages of the total households in Washington which use plain milk:

	%
Chestnut Farms (National Dairies affiliate)	42.8
Lucerne	27.7
Thompsons	19.0
EMBASSY	9.4
Alexandria Dairy	3.0
High's	2.0
Wakefield	1.4
Harvey	1.2
Golden Rule	.5
Purity Farms	.2
No brand given	2.8

(some households reported use of more than one brand, causing the column to add up to more than 100%)

Not listed are Richfield and Martins.

[fol. 1805] The Association has informed us that the relative size of the several dairies, volume-wise, is about as follows (not including Armed Services contracts or surplus sales) in the entire Metropolitan Washington Market:

Dairy	*% Wholesale and Retail Route Sales*	*% Supplied by Association*
Chestnut Farms	45	100.
Thompson's Dairy	15	99.8
Lucerne Milk Company	14	100.
Embassy Dairy	7	—0—
Alexandria Dairy Products	7	100.
Harvey's Dairy	3	100.
Wakefield Dairy	3	33.3
Richfield	2	100.
Highland Farms	1	—0—
Martins' Dairy	1	100.
Golden Rule) Birmingham) Lone Pine) Loudon Farms)	2	100.
	100.	

Purity Farms, a small producer-distributor at Gaithersburg, Maryland, is not included. High's is included with Wakefield. Armed Services and surplus sales amount to about 9,000,000 pounds. The Association supplies about 85 percent of the market, and 90 percent of route sales. The latter is expected to increase to 97 percent with the acquisition of Embassy.

It is reported that the Embassy plant, one of the better-equipped plants in the city, has a capacity for handling 35,000 gallons of fluid milk daily and that it is handling around 18,000 to 20,000 gallons. It is not equipped for manufacturing. About 70 percent of this volume is sold as Class I, and 30 percent as Class II; about 50 percent retail and 50 percent wholesale, including 3,000 gallons daily on a bid basis.

The Association reports that Embassy procures about 12,000 gallons daily from 113 producers holding District of Columbia permits, and about 8,000 gallons from producers in Maryland, Pennsylvania, and on the Delmarva Peninsula (Eastern Shore) who do not have D.C. permit; also, that all of these producers will be diverted to the Baltimore market except six who are located in Virginia and have Washington permits. The latter will probably join the Association.

We are informed that all of the common stock and more than two-thirds of the preferred stock of Embassy Dairies, Inc. is owned by Green Spring Dairy, Inc., Baltimore, Maryland, which is in turn owned by Mr. James J. Ward. Green Spring Dairy, Inc. also owns the Green Spring Milk Company at Queenstown, on the Eastern Shore of Maryland, and Mr. Ward owns the Homestead Dairy Products Company, Salisbury, Maryland.

[fol. 1806] It appears that the Association wants to acquire and operate the Embassy property for a two-fold purpose: (1) to rid the market of an unstable influence, and (2) to acquire an additional outlet for Class I and Class II milk produced by its members which is now being marketed as surplus.

The Association informs us that Mr. Ward is willing to sell Embassy (at a very substantial profit) in order to concentrate his dairy operations at the other points mentioned above.

The Association has estimated that its ownership and operation of the Embassy business should result in immediate financial benefits to its members about as follows:

1. Increase the price for 14,000 gallons per day now being marketed by all dealers on bid-contracts from the present $3.50 per hundredweight to Class I price, at present $6.62 per hundredweight. This increase of $3.12 per hundredweight on 124,400 pounds daily would amout to $3,756 per day.

   312 days (6-day week) @ $3,756 $1,171,872.

2. Probable transfer of 8,000 gallons daily of present Embassy volume to other handlers with Association supply contracts. This would come out of present Association surplus and probably be marketed 70 percent Class I and 30 percent Class II, for which the present blend price would be $5.53 per hundredweight, compared to present value of $2.40, a difference of $3.13, or $2,153 per day.

312 days	@ $2,153	$ 671,736.

3. Expected retention of 12,000 gallons daily volume at Embassy plant, to be sold about 70 percent Class I and 30 percent Class II, or an average excess of $3.13 per hundredweight above surplus prices, or $3,230 per day.

312 days	@ $3,230	$1,007,760.

4. Plus the "normal" earning capacity of the plant on 12,000 gallons daily volume marketed on a 70/30 percent Class I and Class II basis.

"Normal" earning expectancy	$ 250,000.

5. Total Maximum Benefits per Annum $3,101,368.

It does not seem reasonable to expect anywhere near the financial benefit indicated in paragraph 1 above ($1,171,872). This bid-contract business (Army bases, institutions, etc.) does not have to meet D.C. inspection. U.S. Health Department inspection is all that is necessary, and it is very doubtful if these buyers [fol. 1807] would pay very much more than present prices just to procure D.C. inspected milk in preference to other available supplies. There seems to be more merit in items 2 and 3, and possibly 4. And it does seem reasonable to expect real, immediate financial benefits in substantial amounts by the diversion of some 20,000 gallons daily of the present Association surplus to Class I and II distribution through the Embassy plant and other handlers depending upon the Association for their milk supply.

For an analysis of the favorable and unfavorable factors surrounding this proposal, attention is directed to the attached EXHIBIT "B"—copy of a letter addressed to the Bank on June 8, 1954, by Mr. Donald E. Hirsch, Chief, Dairy Branch, Farmer Cooperative Service, USDA. His analysis of the various factors appears to be sound, and we agree with his conclusions as stated in the last paragraph of his letter.

II. MEMBERSHIP RELATIONS:

A. *Number of Members and Volume of Business*: The Association reports 1,917 members at December 31, 1953, all of whom are farmers and each of whom has one vote. All business is transacted with members, none with non-members.

The Association has submitted the following summary showing volume of business for the past three years:

Year	*Dollar Value Milk Sold*	*Total Pounds Milk Sold*	*Dollar Value Dairy Supplies*
1951	$29,909,109.64	505,553,036	$504,495.69*
1952	32,984,562.11	531,749,249	760,593.22*
1953	34,255,364.55	596,422,556	853,724.49*

* Does not include direct-ship purchases by members.

The Association has also submitted information showing members' milk production by states and counties, together with the name of the director serving each county. The production figures are summarized as follows:

State	*Number of Members*	*April 1954 Production (pounds)*
Virginia	969	26,264,849
Maryland	871	25,812,009
Pennsylvania	46	1,266,987
West Virginia	44	1,063,449
Totals	1,930	54,407,294

By referring to the county list, it is observed that about 21,000,000 pounds of the Virginia production is in Loudoun, Culpeper, Fauquier, Fairfax, and Prince William Counties, of importance in the order named, and that almost 20,000,000 pounds of the Maryland production was in Frederick and Montgomery Counties. The Association has members in 38 Virginia counties, 15 Maryland counties, 5 Pennsylvania counties, and 3 West Virginia counties.

[fol. 1808] B. *Requirements for Membership*: Only dairymen are eligible as members, and the bylaws provisions regarding eligibility are more or less standard. All members are required to sign the standard marketing agreement, and the Association issues each member a non-transferable certificate of membership. The membership fee is $100.

C. *Voting Power*: Each member has only one vote. Membership may be canceled when a person ceases to be eligible or to patronize the Association.

D. *Marketing Contract*: The contract presently used by the Association has been changed several times, but in principle is similar to the one used many years ago. The present contract provides for the following:

The producer agrees to:

(1) Deliver all milk he produces except a reasonable amount for home consumption, to the Association. (He cannot sell any milk to any one else but the Association).

(2) Pay the Association 11.6 cents per hundredweight for all milk marketed by the Association. (This rate is 6 cents per hundredweight in the case of producers delivering to receiving stations).

(3) Deliver milk to distributor designated by Association.

(4) Meet Health Department regulations.

The Association, as agent, agrees to:

(1) Sell or dispose of all the marketable milk the producer delivers.

(2) Pay the producer the market price for all marketable milk the producer delivers. (Marketable milk is any milk that meets Health Department requirements).

(3) Guarantee collection and payment for milk delivered.

The contract when signed remains in effect for a period of three years and continues in effect each year thereafter unless canceled upon proper notice by either party.

The contract also provides that the member be bound by the bylaws and by all the rules and regulations of the Association. The bylaws provide that the member is to market his output in accordance with rules adopted by the Association. Both the contract and the bylaws provide for liquidated damages.

E. *Information Program*: It appears that the Association is doing an excellent job in keeping its members informed. This is accomplished by continuous contact of members by fieldmen, by a monthly market news publication, by occasional printed pamphlets and brochures giving complete information about the Association's objectives, method of operation, and accomplishments. Each member also receives a printed copy of the Association's annual report which gives rather complete information financial and otherwise.

F. *Recent Membership Meetings*: The Association is presently engaged in holding a series of special membership meetings over its entire membership area. The purpose of these meetings is to explain in detail [fol. 1809] the Association's proposal to acquire and operate the Embassy Dairy.

It was the privilege of the undersigned to attend the meeting held at Leesburg, Virginia, on June 3, 1954.

I accompanied Association officials to the meeting, but was not introduced to the members and did not take any part in the meeting. I was pleased to observe that Association directors and officers made a full and complete presentation of this matter to the members, which presentation was followed by a question and answer period which lasted about an hour. Pertinent questions were freely asked from the floor and frankly answered by the officers and directors.

There were about 175 members present at this meeting, at the close of which there was unanimous endorsement of the proposal. This endorsement included the Association's proposal to defer any further cash refunds until the Association is out of debt and to supply all milk needed by the Embassy plant at surplus prices and leave all net operating margins derived from the operation of that plant in the Association as capital, such retentions, of course, to be allocated annually to all members of the Association on the basis of their total patronage. The matter of Federal income tax liability on the part of the members for capital left in the Association was also discussed.

There appeared to be the usual tendency, as in meetings of this character, to minimize the difficulties and problems that may be encountered and perhaps to overemphasize the financial benefits that may reasonably be expected to accrue from this new venture. It appeared, however, that the potential benefits to be derived as a result of selling as Class I and Class II milk what is now surplus milk are very real and doubtless outweigh the disadvantages that may be encountered.

G. *Conclusion*: It is believed that the Association's membership relation program is both sound and aggressive.

III. MANAGEMENT AND DIRECTORATE:

A. *Board of Directors*: The Association's articles of incorporation state that the Association shall have a board of 30 directors. The bylaws provide for 21 directors, which is the number the Association has had for many years. This has been called to the attention of the Association and will be cleared at the first opportunity. The legal department seems to think that this situation will not adversely affect the Bank's interest for the reason that the number of directors does not exceed the number for which provision is made in the articles of incorporation.

The membership area is divided into districts with approximately the same number of members in each district. The territory is re-districted by the board of directors from time to time. The members of each district nominate a director, which director is elected [fol. 1810] by all the members at the annual meeting. A review of the names of these directors indicates that they are high calibre and are representative of the most successful dairymen in the area.

Names and addresses of the officers of the Association are as follows:

J. Homer Remsberg, President
Middletown, Maryland
C. H. Bowen, 1st Vice President
Remington, Virginia
Basil Mobley, 2nd Vice President
Derwood, Maryland
B. B. Derrick, Secretary-Treasurer
1756 K. Street, N.W.
Washington, D.C.
W. B. Hooper, Assistant Secetary and Assistant Manager
1756 K Street, N.W.
Washington, D.C.

Neither Mr. Derrick or Mr. Hooper is a Director.

B. *Management and Personnel*:

1. *Central Office and Supply Warehouse*: Key men are as follows:

Bruce B. Derrick, Secretary-Treasurer, is really the General Manager. He has carried on the affairs of the Association since 1934 and has been very successful. Mr. Derrick is approaching retirement age, but expects to be on the job a few years yet—at least in a supervisory or counsellor capacity. He has a very capable staff of men under him, several of whom in his opinion are capable of replacing him at any time.

W. B. Hooper, Assistant Manager and Assistant Secretary, is Mr. Derrick's righthand man, and a very capable one at that. He has been with the Association since 1935 and had prior experience with the USDA. Mr. Hooper is about 45 years of age, married, and has three children. We understand that the board will probably designate him to give general supervision to the operation of the Embassy plant.

J. E. Click, the Association's Economist, has been with the Association a number of years. He is an agricultural college graduate.

C. F. Bletch, the Production Supervisor, has 7 fieldmen under him. He is reported to be very capable.

The Milk Expeditor is J. E. Burton, who came to the Association several years ago after working with the Department of Agriculture's Marketing Administration.

The lab technician is William Kreh. He has 3 men in the laboratory with him.

[fol. 1811] Paul Snyder is the Supervising Accountant and Office Manager. He and his staff report to Mr. Hooper.

C. F. Cole is in charge of the Dairy Equipment Purchasing Department, and T. W. Lawler works with him as Sales Supervisor, with 3 men to assist him.

The Association is capably staffed by experienced men.

2. *Proposed Embassy Division*: The Association has employed Ridgely Parks, effective July 1, 1954, to manage the operations of the Embassy plant under the general supervision of the main office. They have given him a 5-year contract at $20,000 per annum. Incidentally, we are informed that Mr. Derrick's total compensation last year was $22,000; Mr. Hooper's $10,000. Mr. Parks is 44 years of age, married, and has two children. He is experienced in the dairy business and comes to the Association highly recommended. He was General Manager of Green Spring Dairy in Baltimore from 1934 to 1948, and for the past four years has been Vice President in Charge of Sales for Koontz Dairy in Baltimore. He is a University of Maryland graduate.

We are informed that the Association intends to retain all of the key personnel in the Embassy Dairy plant from the plant superintendent on down.

The plant has a closed shop, as is the case with all major dairy plants in Washington. The plant employees are members of the AF of L. It is our understanding that the labor union contracts in all plants in the District of Columbia are uniform in every respect. We have also been informed that the morale of the personnel at this plant is considered good.

C. *Conclusion*: It is believed that the Association is well managed and capably staffed in every department.

IV. Method of Operation:

This subject has been pretty well covered in the comments on pages 2 to 5 of this report, as supplemented in the operations section of the Treasurer's Credit Report. No further comments are needed here.

V. Competitive and Economic Factors:

As indicated elsewhere in this report, the Association exercises rather close control over the production and distribution of most of the milk distributed in the District of Columbia and in the Metropolitan Washington Market. This is facilitated by the fact that there are fewer distributors in this market than in most other markets of comparable size. There is little doubt that the Association's members produce as high quality milk as is to be found anywhere, and that they come fairly close to living up to their slogan "Producers of the World's Highest Quality Milk". Also, the Washington market has always been a growing market and relatively stable—much more so than most of the large industrial markets. While the problem of surplus milk arises from time to time, the [fol. 1812] Washington market has not been plagued by the surplus milk problem as have most large markets.

Worth noting are the comments made by Mr. Hirsch under section 4 on page 3 of the attached Exhibit "B".

VI. Cooperative Aspects:

Reference is made to the two memoranda of the legal department bearing date of June 4, and supplemental memorandum of June 9, 1954, which are incorporated as a part of this report.

In view of the comments of the legal department, it is recommended that the loan agreement include the following special conditions, as well as those outlined in the Treasurer's Credit Report:

(1) The Association's board of directors agrees to recommend to its membership for adoption not later than at its next annual meeting such changes, amendments, or additions to its charter, bylaws, and mar-

keting agreement, as may appear to the Bank and to the Association's attorney to be desirable.

(2) Not later than immediately after the Association's regular monthly board meeting in the month of July, 1954, the Association shall supply the Bank a certified copy of a resolution, in form and substance acceptable to the attorney for the Association and to the attorney for the Bank, adopted at that meeting by the Association's board of directors for the purpose of setting forth the obligation of the Association to account to its patrons for all funds received in excess of the cost of doing business.

VII. CONCLUSION:

It is believed that the Association has a membership, volume of business, management, and business policies of such character as to warrant favorable consideration of its request for loans; subject, of course, to the findings of the Treasurer's Credit Report as to the amount, security, and repayment provisions.

This report was prepared by the undersigned from information in the files and from information obtained during several conferences with representatives of the Association. Also, one membership meeting was attended.

/s/ JNO. B. JONES
Jno. B. Jones, Secretary

JBJ:DB
6-9-54
Copy for File
FCA
CB
BA
X

NOTED AND INITIALED BY:

√SMT ..... √JBJ ..... √RBJ .....

ACTION ENTERED MINUTES 6/9/54 By JBJ

FILE: .....

[fol. 1813]

EXHIBIT "B" TO DEFENDANT'S EXHIBIT 19

BALTIMORE BANK FOR COOPERATIVES

UNITED STATES DEPARTMENT
OF AGRICULTURE
FARMER COOPERATIVE SERVICE
Washington 25, D. C.

June 8, 1954

Mr. S. M. Thomson, President
Baltimore Bank for Cooperatives
Baltimore 3, Maryland

Attention: Mr. Jack Cobb

Dear Mr. Thomson:

I have completed a brief analysis of the proposal for the Maryland-Virginia Milk Producers Association to Purchase Embassy Dairy.

There has been much less specific, factual information than is desirable but the weight of the evidence appears conclusive. Based on the information available, these are the major factors as I see them:

Unfavorable Factors

1. *The price asked for Embassy is considerably above its market value as a going business.*

   a. The plant is reasonably well equipped and appears to permit a reasonable degree of efficiency. "Housekeeping" and maintenance are good. However, it has very poor milk receiving facilities, insufficient cold storage space, and insufficient dry storage space on the premises. It also is rather poorly located. A reduction in volume would alleviate storage problems but not improve receiving conditions materially or affect the location. The overall facility picture is satisfactory but by no means outstanding.

b. National Dairies is engaged in its greatest facility expansion program in history but, in my opinion, neither Chestnut Farms (its local unit) nor any other dealer would pay anywhere near 3.65 million dollars for the Embassy business.

c. The appraisal value of $1,022,000 for land and buildings probably is high; the appraisal value of $1,319,000 for all equipment certainly is too high. It is not reasonable to value used equipment on the basis of the full cost, installed, of new, unused equipment. This is the way the appraiser reached his figures, however, according to Mr. Cobb's investigation of the appraisal report.

[fol. 1814] d. The amount actually asked for goodwill is at least 1 million dollars ($3.65 million dollars minus something less than 2 million for fixed assets and 700 thousand for current assets and some investments.) Based on the reported volume this is equivalent to at least $50 per daily gallon on an annual average basis. That is far more than any "normal" business is worth. This business, with its growth reportedly due in large part to price cutting, would have less goodwill than a "normal" business. Thus it is evident that the contract price is considerably in excess of the actual market value of the business.

2. *Estimates of the margin to be realized from operating the Embassy business have been too high.*

a. It appears from inspecting the balance sheet of Embassy for its last fiscal year that the organization had a margin *before Federal income taxes* of approximately $150,000. It is reported that the payroll could be reduced appreciably if relatives of the owner were disassociated from the business. Thus, operating under identical conditions, a Federal income tax exempt cooperative might have had a net margin of a quarter of a million dollars. (This is speculative since it has not been possible to see a copy of an operating statement.)

b. It has been reported that Embassy engages in price cutting by granting substantial discounts. To the extent it can keep current customers without granting these special discounts, the cooperative could increase the margin by obtaining higher resale prices. (This, of course, is favorable but is outweighed by other pertinent considerations.)

c. However, it is reasonable to expect a substantial drop in volume if the cooperative assumes control. Without price-cutting, the business presumably will lose a large part of its Federal contract business, some of its regular wholesale customers, and perhaps a few retail customers. A loss in volume will almost certainly result in higher operating costs per unit of milk handled.

d. The cooperative reported that Embassy has not dealt with the association in the past because it has been able to obtain lower priced milk from local nonmember producers and from other sources. It appears reasonable to assume that a substantial part of Embassy's margin has resulted from these lower prices paid producers although these have, in part, been offset by lower resale prices. The cooperative will have to pay shippers to this plant the same price it pays to those shipping to other dealers. Thus the cooperative will not have an opportunity to make plant operating savings from low-cost milk.

e. Anticipated loss in volume, plus the elimination of the opportunity to save on low priced milk, appears to indicate the probability of a rather small margin when and if the cooperative takes control of the Embassy business.

[fol. 1815] 3. *The probable increase in producer price of milk sold for use under Federal contracts has been over estimated.*

a. Cooperative officials indicated that they expected the producer price of milk sold for use in meeting Federal contracts to rise from $3.25 to the regular

Class I price. This would result in a substantia' increase in returns to members.

b. It is possible—if Embassy is the exponent of price cutting, as reported—that the Federal contract prices will rise if the cooperative buys the Embassy business. However, the cooperative can not control Federal purchases and can not influence them greatly. Such purchases are not made in accordance with D.C. health regulations. Therefore, it is reasonable to assume that a rise in resale prices high enough to enable dealers to pay Class I prices to producers would simply result in no Federal contract purchases of local milk. The milk would be purchased from other sources.

c. A relatively small increase in the price paid producers for milk used in meeting Federal contracts seems probable. A windfall gain resulting from a jump to the full Class I price appears highly improbable.

4. *The problem of maintaining working relations with dealers while the association competes with them for customers has not been adequately emphasized.*

a. It is reported by the association that the dealers would rather have the Embassy business operated by the cooperative than by its present owners. This sounds reasonable in view of the reported price cutting by embassy.

b. The association also reports that it expects to maintain a substantial distributing business even though volume presumably will be below present levels. This means competing for new customers; no business can be maintained without such action. This, in turn, means competition on the streets with the buyers of perhaps 90 percent of the association's milk. It appears inevitable that, in time (1) the Embassy business will gradually dwindle away, or (2) local dealers will protest vigorously against the

cooperative remaining in competition with them. The latter could lead to dealer pressure to relax health barriers to importation of "outside" milk, and to a reduction in existing high price levels in this market.

c. The business will always have value but that value may drop rather rapidly. Speedy payment by producers for the business appears highly desirable in view of these conditions.

[fol. 1816] *Favorable Factors*

1. *The effect of the purchase on operation of the market-wide pool appears to justify paying in excess of the market value of the business.*

   a. It is anticipated that much of the present surplus on the Washington market will be shifted to Baltimore by the transferral of nearly all present Embassy shippers to Green Spring Dairy. (Cooperative officials should be in a position to know whether this transfer actually will occur. If most of the present Embassy shippers joined this cooperative, and stayed on the Washington market, potential benefits to present members through the market wide pooling procedure would be greatly reduced. However, without a special study of this situation, we have to assume that the transfers will occur as anticipated by cooperative officials.)

   b. A considerable volume of milk of Maryland-Virginia members can be shifted from surplus to Class I and II use. This will mean, under current conditions, an increase in value of such milk of approximately $3 per hundredweight.

   c. The present volume of Embassy is reported to be about 20,000 gallons or 172,000 pounds per day. This is equivalent to about 60 million pounds per year. If this were reduced to 30 million pounds, and the price differential reduced from $3 to $2.50 per hundredweight, the total increase in value still would be about $750,000. All of this increase would accrue to members of the cooperative.

d. If the market suffered a shortage of milk—as was the case a few years ago—the anticipated gain from higher priced use of a large quantity of milk would be non-existent. Under such circumstances, the Embassy business would be worth no more—and probably less—to the cooperative than to existing dealers. However, while it is impossible to forecast accurately local supply and demand conditions, it appears that supply will be in excess of demand much of the time during the next several years, at least.

2. *The proposal to calculate the value of all milk going to the cooperative plant at surplus prices, when computing the market blend price, has merit.*

a. All cooperative members would receive the same price for milk of like quality and composition. However, in making market pool computations the cooperative would enter the quantities received at the cooperative (now Embassy) plant at surplus prices. The resulting blend price would be approximately the same as at present. The difference between the blend price and the actual realized value of all milk would be retained in order to repay the loan(s) on the distributing business.

[fol. 1817] b. Assuming the plan to be legal, this is a rather "painless" way to raise capital to repay loans. Financing the purchase is a major problem but this is an attractive way to obtain some of the capital needed.

There are many questions to which the cooperative has or can obtain the answers. These relate to such things as employee relations, customer attitudes, and competitive conditions in the market. The cooperative officials, with their intimate knowledge of the market, are in the best position to evaluate such factors. Evidently they have found the overall situation favorable.

In conclusion, it appears to me that (1) the difficulties and problems have been minimized in the discussions I have

heard while the potential benefits have been over emphasized, but (2) the cooperative has an unusual opportunity to increase average returns to members through purchase of the Embassy milk distributing business. The potential benefits arising from use in Class I and II of a higher proportion of members' milk appear to outweigh all probable disadvantages. Careful planning and wise managerial decisions should make the purchase beneficial to members of the cooperative.

If we can be of further assistance, please let us know.

Sincerely yours,

(Signed)
Donald E. Hirsch
Chief, Dairy Branch

cc: Mr. J. D. Lawrence

[fol. 1818]

DEFENDANT'S EXHIBIT 20

BALTIMORE BANK FOR COOPERATIVES

FARM CREDIT ADMINISTRATION—DISTRICT NUMBER TWO

PENNSYLVANIA, DELAWARE, MARYLAND DISTRICT OF COLUMBIA, VIRGINIA, WEST VIRGINIA, PUERTO RICO

BALTIMORE, MARYLAND—3
P.O. Box 1636

June 23, 1954

Mr. B. B. Derrick, Secretary-Treasurer
Maryland and Virginia Milk Producers' Association, Inc.
1756 K Street, N.W.
Washington 6, D. C.

Dear Mr. Derrick:

There is attached in duplicate loan agreement No. O & F-1320 providing for operating capital and facility loans totaling $2,100,000. Many of the provisions of the loan

agreement have been discussed informally with you and Mr. Hooper. However, if you so desire, we will be pleased to try to answer any questions which you may have concerning this loan agreement. If, after careful study, the loan agreement is deemed acceptable by the association, will you please have it executed on behalf of the association in the space provided and return the original copy to this Bank. The duplicate copy is for the association's files.

In addition to the security documents to be delivered upon settlement date, will you please arrange to have all fire insurance policies covering the mortgaged property endorsed with a standard form of mortagee clause in favor of this Bank in order that the insurance policies may be delivered upon settlement date.

We are very pleased to have the opportunity to be of service to the association.

Very truly yours,

/s/ J R Cobb
Jack R. Cobb
Assistant Treasurer

Enclosure

[fol. 1819]

DEFENDANT'S EXHIBIT 21

BALTIMORE BANK FOR COOPERATIVES

LOAN AGREEMENT

No. O & F-1320
Date June 23, 1954

Re: Maryland and Virginia Milk Producers' Association, Inc.
Washington, D. C.
$1,150,000 Facility Loan
950,000 Operating Capital Loan

$2,100,000 Total Loans

The findings required by law having been duly made, the Baltimore Bank for Cooperatives agrees to make loans to

the above-named cooperative association upon the following terms and conditions:

AMOUNT:

Not to exceed:

$1,150,000	Facility Loan
950,000	Operating Capital Loan
$2,100,000	Total Loans

INTEREST:

Each advance made hereunder shall bear interest at the rate prescribed in accordance with law, payable monthly.

PURPOSE:

The proceeds of loans, supplemented by the association's own funds and funds borrowed from its members and from commercial banks, shall be used to make payment in full for physical facilities and personal property being purchased from Embassy Dairy, Inc., Washington, D. C. under the terms of a contract of sale dated May 26, 1954; also for the purchase of such stock in the Bank as the association is required by law to own which stock shall be held by the Bank as security for all indebtedness of the association to the Bank.

NOTES AND SECURITY:

Advances made hereunder shall be evidenced by a promissory note, or notes, acceptable to the Bank and shall be secured by a first deed of trust (mortgage), insured by an acceptable policy of title insurance, covering all land, buildings, machinery and equipment being acquired from Embassy and located at, or near, 1615 First Street, N.W., Washington, D. C. and at, or near, Alexandria, Virginia, and covering land, and buildings comprising the association's farm supply

warehouses near Frederick, Maryland, and the note shall also be secured by an assignment of certain leases being acquired from Embassy Dairy covering paved parking lots and a dry storage warehouse.

The association agrees that it will not, without prior approval of the Bank, pledge or hypothecate any of its assets and that it will, upon demand of the Bank, pledge as additional security for loans hereunder such of its assets in such form and manner as the Bank may require.

ADVANCES:

Upon delivery of the security required, not to exceed $1,750,000 may be advanced by the Bank of which sum $1,150,000 shall be classified as a facility loan and $600,000 shall be classified as operating capital loan.

Upon determination by audit of the purchase price of trade accounts receivable and product and supplies inventory from Embassy Dairy, Inc. as provided for in the sales contract, not to exceed $350,000 or fifty percent (50%) of the purchase price of these assets, whichever amount is less, may be advanced by the Bank and shall be classified as an operating capital loan.

[fol. 1820] REPAYMENT:

All advances made hereunder shall be repaid by monthly installments of not less than $25,000 due on the twentieth day of each month commencing September 20, 1954.

In addition to minimum monthly payments specified above, the association shall remit to the Bank for credit to the loans on or before March 20 of each year, commencing March 20, 1955, an amount equivalent to 50 percent of net additions to capital accounts in excess of $300,000 during the preceding fiscal year. Repayment shall be applied first to operating capital loans and then to facility loans.

The Treasurer of the Bank is directed to demand payment of any balance outstanding hereunder on August 20, 1961.

EXPIRATION:

Any unadvanced portion of this commitment shall be canceled on August 31, 1954, provided that the Bank may at its option and without notice extend said cancelation date for such period or periods of time as the Bank shall, in its sold discretion, determine.

CONDITIONS:

While this loan agreement is in effect, the association will:

(a) Maintain its status as a cooperative association as defined by the Farm Credit Act of 1935.

(b) Furnish such information as the Bank may request relative to its affairs, and permit such examination of its books and records as the Bank may specify.

(c) Maintain insurance, covering such risks, in such companies, forms and amounts, and fidelity bond coverage in such companies, forms and amounts on such officers and employees, as the Bank may request.

(d) Maintain management and business policies satisfactory to the Bank, and promptly make such changes therein as the Bank may from time to time request in writing.

(e) Declare or pay cash dividends, or make any cash distribution of capital or patrons' equities, only upon written approval of the Bank.

(f) Obtain loans from other lenders only upon written approval of the Bank. Permission is hereby granted the association to borrow not in excess of $250,000 for short-term working capital purposes between July 1, 1954 and September 30, 1954.

(g) Maintain a credit policy satisfactory to the Bank.

SPECIAL CONDITIONS:

The association further agrees:

(1) Prior to receiving any advances hereunder, the association shall submit evidence to the Bank that it has available $1,500,000 in cash funds arising from operating capital owned by the association and from the sale to members of 5 percent certificates of indebtedness, callable in 5 years and maturing in 12 years, and that it has commitments from commercial banks who shall have agreed to lend not more than $500,000 evidenced by unsecured promissory notes of the association payable in 12 equal quarterly installments.

(2) The association's board of directors agrees to recommend to its membership for adoption not later than at its next annual meeting such changes, amendments or additions to its charter, bylaws, and marketing agreement, as may appear to the Bank and to the association's attorney to be desirable.

[fol. 1821] (3) Not later than immediately after the association's regular monthly board meeting in the month of July, 1954 the association shall supply the Bank a certified copy of a resolution, in form and substance acceptable to the attorney for the association and to the attorney for the Bank, adopted at that meeting by the association's board of directors for the purpose of setting forth the obligation of the association to account to its patrons for all funds received in excess of the cost of doing business.

(4) The association agrees to continue its efforts to sell its members five percent (5%) certificates of indebtedness maturing in twelve years and callable at the option of the board after five years, until the sum of at least $1,750,000 has been paid or subscribed, provided subscriptions are accompanied by a note authorizing payment to be deducted from members' milk checks.

(5) In accepting this loan contract, the association binds itself during the life of the loan agreement to increase its capital funds, through retained margins or otherwise, by at least $300,000 annually.

DEFAULT:

If any representations heretofore or hereafter made by or on behalf of the association to the Bank shall prove false or if the association shall breach any of its obligations or agreements in connection herewith, the Bank may immediately declare all indebtedness arising hereunder due and payable and exercise all rights and remedies for the collection thereof.

ACCEPTANCE:

This agreement shall not become effective unless the association shall, within thirty days from date, signify its acceptance of the terms and conditions hereof by signing and returning a copy of this agreement to the Bank.

BY DIRECTION of the Executive Committee, this 23rd day of June, 1954.

BALTIMORE BANK FOR COOPERATIVES

By /s/ S. M. THOMSON
S. M. Thomson, President

ACCEPTED AND AGREED TO:

MARYLAND AND VIRGINIA MILK PRODUCERS' ASSOCIATION, INC.

By .....
Its

Date .....

[fol. 1822]

DEFENDANT'S EXHIBIT 22

MARYLAND AND VIRGINIA MILK
PRODUCERS ASSN. INC.
DIRECTORS' MEETING
APRIL 9, 1954

—oOo—

The regular meeting of the Board of Directors of the Maryland and Virginia Milk Producers Association was held at the office of the Association located at 1756 K Street, N.W., Washington, D.C. on Friday, April 9, 1954.

There were present,

Directors:

J. Homer Remsberg
Paul R. Marsh
G. W. Carper
Dr. E. H. Marsteller
T. T. Curtis
A. G. Willis
E. C. Norman
J. Emory Kirkpatrick
C. H. Bowen
D. C. Harshman
W. D. McNair
J. F. Potts
Jesse M. Burall
M. H. Ramsburg
L. H. Remsberg
P. B. Harlan
Basil Mobley
W. J. Hahn
Upton Gladhill
Edwin D. Fry
W. C. Poole

comprising a quorum of the Board; and

Representatives:
C. T. Livengood
Dr. Oscar S. Martin
Leon Andrus
I. D. Van Metre

Also

Secretary-Treasurer:
B. B. Derrick
Assistant Secretary:
W. B. Hooper

Mr. J. Homer Remsberg, President of the Association presided and Mr. W. B. Hooper acted as secretary of the meeting.

The meeting was called to order by the President at 1:00 p.m., for the purpose of transacting such business as may properly come before the Board.

[fol. 1823] Upon motion of Dr. E. H. Marsteller, seconded by Mr. Upton Gladhill, the minutes of the regular meeting of the Board of March 12 were approved as read.

Upon motion of Mr. Basil Mobley, seconded by Mr. W. J. Hahn, the Advertising Committee minutes of March 24 were approved for accuracy.

Upon motion of Mr. W. C. Poole, seconded by Mr. P. B. Harlan, the Auditors' Report for the month of February 1954 as read by Mr. E. C. Clifford of the Wayne Kendrick & Company, Certified Public Accountants, was approved and accepted for filing.

Upon motion of Mr. A. G. Willis, seconded by Mr. E. D. Fry, the Building Committee minutes of March 24 were approved for accuracy.

Upon motion of Mr. A. G. Willis, seconded by Mr. Upton Gladhill, the recommendation of the Building Committee was approved that the purchase of the four lots on Wilson Boulevard numbered 18, 19, 20 and 21, as the site for the future office building of the Association be consummated; the price being $30,000 for lots 18, 20 and 21, and $15,000 for lot 19 with improvements thereon.

Upon motion of Mr. A. G. Willis, seconded by Mr. M. H. Ramsburg, in view of the press of important work falling

upon the staff of the Association at this time, that activity on the proposed new office building be deferred until later on in the year when there will be time to devote more attention to it.

Upon motion of Mr. W. J. Hahn, seconded by Mr. E. C. Norman, the rental of the present house on lot 19 of the property acquired on Wilson Boulevard should be handled through a rental agent rather than direct by the Association.

[fol. 1824] Upon motion of Mr. Upton F. Gladhill, seconded by Mr. A. G. Willis, the minutes of the Production Control Committee of April 1 were approved for accuracy.

Upon motion of Mr. M. H. Ramsburg, seconded by Mr. Paul Marsh, the suggested letter to be sent to the membership relative to curtailment and control of production was approved to be sent to the membership subject to the approval of legal counsel.

Upon motion of Mr. E. D. Fry, seconded by Mr. A. G. Willis, the report of the committee attending the Vendo Automatic Vending Machine presentation of April 1st at the Mayflower Hotel was accepted.

Upon motion of Mr. W. J. Hahn, seconded by Mr. Upton F. Gladhill, the Finance Committee minutes of April 9 were approved for accuracy.

Upon motion of Mr. W. D. McNair, seconded by Mr. W. C. Poole, the recommendation of the Laboratory Committee increasing the payment for butterfat samples to the Dairy Laboratories from 25¢ to 36¢ one-half of which the Association shall pay, was approved subject to the provision that the Dairy Laboratories make the necessary improvements recommended by the Committee.

Upon motion of Mr. Upton F. Gladhill, seconded by Mr. J. F. Potts, the blend prices to be paid producers for milk containing 3.5% butterfat for the month of March were set as follows:

> Washington, D.C., and Alexandria, Virginia permit holders $4.78, plus premiums; Virginia Grade "A" permit holders $4.73, plus premiums; Maryland permit holders $4.73 without premiums; butterfat differential [fol. 1825] to be 8¢ per hundredweight for each 1/10th of 1% under or over 3.5% as the case may be.
>
> Garlic milk price $1.28 without premiums.

Upon motion of Mr. W. D. McNair, seconded by Mr. Paul B. Harlan, the Association shall disclose to the membership in a "Letter of Advice" the percentage and amount of Unexpended Brokerage for 1953 which is allocated on the books and which amount will be subject to income tax by the individual producers under the regulation of the Internal Revenue Code of 1951.

Upon motion of Mr. T. T. Curtis, seconded by Mr. Basil Mobley, the letter advising the membership of the Board's decision relative to limiting the number of assignments to a producer which was approved by legal counsel be sent to the membership at the earliest possible date.

Upon motion of Mr. Basil Mobley, seconded by Mr. A. G. Willis, the President appoint a committee to study the advisability of applying for a Federal Marketing Order for the Washington Market and that this committee consist of two Directors who will work with the Management to this end and report back to the Board. The President appointed Mr. T. T. Curtis and Mr. Basil Mobley as members of this Committee.

Upon motion of Dr. E. H. Marsteller, seconded by Mr. W. J. Hahn, the Management and staff of the Association were instructed to appear before the Virginia Milk Commission at the hearings set for Friday, April 16, and oppose any reduction in the Class I price of milk for the Arlington-Alexandria Area and the Manassas, Virginia Area. Mr. Fry wished to be recorded as voting "No" to making any appearance before the Milk Commission.

[fol. 1826] Upon motion of Mr. A. G. Willis, seconded by Mr. T. T. Curtis, in the event the Virginia Milk Commission should reduce the minimum price to be paid for Class I milk in spite of the evidence to the contrary presented by the Association, a special meeting of the Board of Directors will be called as soon as possible in order to decide what action should be taken.

Upon motion of Mr. W. J. Hahn, seconded by Mr. E. D. Fry, the Board went into executive session and adjourned out of that session.[1]

/s/ J. Homer Remsberg
President

/s/ W. B. Hooper
Assistant Secretary

[1] There were no minutes recorded of the executive session.

[fol. 1827]

DEFENDANT'S EXHIBIT 23

MARYLAND AND VIRGINIA MILK PRODUCERS ASSN. INC. FINANCE COMMITTEE MEETING APRIL 14, 1954

—oOo—

A meeting of the Finance Committee of the Board of Directors was held at the office of the Association located at 1756 K Street, N.W., Washington, D.C., on Wednesday, April 14, 1954.

There were present,

Directors:

J. Homer Remsberg
Upton F. Gladhill
W. J. Hahn
Basil Mobley
T. T. Curtis
E. C. Norman

Also present were,

Secretary-Treasurer:
B. B. Derrick

Assistant Secretary:
W. B. Hooper

and

Col. Wm. J. Hughes, Association Counsel

Mr. J. Homer Remsberg, President of the Association, presided and Mr. W. B. Hooper acted as secretary of the meeting.

The meeting was called to order at 10:30 a.m., for the purpose of transacting such business as may come before the Committee.

Upon motion of Mr. T. T. Curtis, seconded by Mr. Basil Mobley, it was recommended to the Board of Directors that the Association contribute toward the cost of the North-

eastern Dairy Conference study of fluid milk prices in the Eastern markets; that such contribution be on a membership fee basis, provided other participating organizations make contributions on the same basis.

Upon motion of Mr. W. J. Hahn, seconded by Mr. Upton F. Gladhill, the Committee recommended to the Board of [fol. 1828] Directors that it give favorable consideration to the purchase of the Embassy Dairy.

The meeting adjourned at 12:15 p.m., without motion.

/s/ J. Homer Remsberg
President

/s/ W. B. Hooper
Assistant Secretary

[fol. 1829]

Defendant's Exhibit 29

MEMORANDUM RE:

Purchase of the

EMBASSY DAIRY

by the

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

June 15, 1954

[fol. 1830] FINANCING PLAN

[fol. 1831] I. Reason for Decision to Purchase Dairy.

(a). This purchase should provide an additional outlet for Association milk in the fluid sales classifications of between 12 to 15 thousand gallons per day which means moving that amount of milk from a surplus or manufacturing use to a fluid

classification, or, about $675,000 per year benefit to the membership as a whole.

(b). By the terms of the Purchase Contract the Embassy Dairy's present owners, all members of that family, agree, under the terms of a negative covenant which they have signed, to abstain from doing business in the Metropolitan Washington Area market in any manner whatsoever, directly or indirectly, for a period of 10 years.

II. Cost of Dairy.

The Association will purchase the fixed assets of the dairy clear of debt, i.e., land, buildings, dairy and automotive equipment, containers, etc., in present use, for two million nine hundred forty thousand ($2,940,000) dollars.

This has been appraised by Charles E. Koones, former president of the Washington Board of Real Estate Appraisers, at one million twenty-two thousand ($1,022,000) dollars covering real estate; and the E. A. Kaestner Company, Baltimore, dairy engineers, have appraised the dairy equipment, the automotive equipment, etc., at one million three hundred nineteen thousand one hundred seventy-one ($1,319,171) dollars.

In addition to the assets enumerated above the Association will purchase at cost or book values, subject to audit by an independent Certified Public Accounting firm, as of the date of acquisition, the [fol. 1832] accounts receivable and inventories of new containers, supplies, etc., not now in use, at an estimated total of seven hundred thousand ($700,000) dollars.

In addition, the Association desires to set up a sum of three hundred thousand ($300,000) dollars as operating capital.

This means that the total cash outlay will amount to approximately four million ($4,000,000) dollars, all of which must be paid in cash as soon as the re-

spective values have been determined. In the case of real estate, equipment, etc., amounting to two million nine hundred forty thousand ($2,940,000) dollars, this must be paid in full under the terms of the purchase agreement at the time of settlement. The accounts receivable and inventory values will be paid as soon as the actual values are determined by the auditors.

The dates of settlement are that a million ($1,000,000) dollars must be paid by July 1, 1954, and the balance not later than August 1, 1954. As evidence of its intentions, the Association has deposited in escrow, the sum of one hundred thousand ($100,000) dollars as liquidated damages, with an additional one hundred thousand ($100,000) dollars pledged to be paid in the event the Association should not complete the purchase.

III. FINANCING.

(a). The Association has in its own reserve, assets of approximately one million four hundred thousand ($1,400,000) dollars, of which approximately nine hundred thousand ($900,000) dollars is in the form of available cash and bonds; the balance being in inventories, accounts receivable, land and buildings. Utilization of all of these [fol. 1833] assets would affect the working capital of the Association; for this reason it is felt that it would be more advisable to finance the entire purchase so as not to impair the Association's working cash position. To this end the following arrangements are being made:

1. A commitment has been received from the Baltimore Bank for Cooperatives to loan the Association two million one hundred thousand ($2,100,000) dollars at an approximate average rate of interest of 4% for 7 years; payments to be made in equal amounts over the 7-year period. The Baltimore Bank for Cooperatives as security for this loan will

receive a Deed of Trust (First Mortgage) on all fixed and current assets of the Embassy Dairy, together with the First Trust on the lands and buildings of the Association excluding the present office building and land, and excluding the Association's current working capital.

2. In accordance with a proposal presented to some 15 banks in the territory, and to the Metropolitan Area banks, the Association proposes to borrow up to one million ($1,000,000) dollars on a 3-year promissory note, in which all the local banks will participate in accordance with their ability and inclination to do so. This loan would be subordinate to the First Trust of the Baltimore Bank for Cooperatives, but would have precedence over any other indebtedness of the Association; the promissory note referred to is to be paid off in 12 equal payments (quarterly) over a period of three years and said note will bear interest at the rate of 5% payable quarterly. In order to handle this [fol. 1834] as efficiently and expeditiously as possible the note will be serviced through one central servicing bank in Washington who will issue certificates of participation to local banks in the amount of their subscription to the overall note, and will handle the payments of principal and interest to those banks.

   The Metropolitan banks participating in this financing are the Riggs National Bank; the National Savings and Trust Company; the Hamilton National Bank, and the National Metropolitan Bank. It may be of interest to note that at the meeting held in this office several weeks ago (attended by representatives of the Metropolitan Washington banks as well as of local banks in the terri-

tory), at which time the financing plan was discussed, it received the unanimous approval of every bank represented.

(b). The balance of financing must come from the producers. To do this the Association, through its Directors, will offer to the membership Certificates of Indebtedness bearing 5% interest, payable annually, from the date of issue, the said date of issue to be July 1 and January 1. These Certificates will have a minimum maturity date of five years, and a maximum redeemable date of 12 years. These Certificates will be negotiable and will be guaranteed by the Association. These Certificates may be purchased either by payment in full by cash, or on the part of a producer by signing a promissory note for the amount of subscription, which note will authorize the Association to make deductions from the producer's milk check over a period [fol. 1835] of not more than 24 months. These deductions will be applied against the purchase of the Certificates. As soon as the full amount has been paid in, the note will be returned to the producer together with his Certificate of Indebtedness, at which time it will begin bearing interest. As a goal for the producer's subscription, the Association is asking each and every member to subscribe not less than 5% of his last year's gross milk check. This would raise approximately one million seven hundred fifty thousand ($1,750,000) dollars. Any amount subscribed by the producers in excess of the amount actually needed to make up four million ($4,000,000) dollars will be used to immediately retire the indebtedness to the local banks who participate in the secondary loan.

IV. Method of Retirement of Indebtedness.

The indebtedness incurred in this purchase will be paid off by a combination of methods.

(a). By eliminating payment in cash of the Association's Unexpended Brokerage Refunds until such time as the bank indebtedness is paid. These refunds will be used to retire the indebtedness of the Association to the banks. This will amount to approximately three hundred thousand ($300,000) dollars per year. This does not mean, of course, that any producer whose refund is temporarily held up will lose that money. It simply means that instead of receiving his refund in cash at the end of six years, it may be 10 or 12 years before it is received. However, he will still maintain his full equity in the Asso- [fol. 1836] ciation's assets and his share will be recorded on the books and he will receive that amount in cash as soon as the indebtedness is retired.

(b). By utilizing the profits from the operation of the dairy; that is, the normal profits that the dairy might make as the result of its operations. The producer will receive credit proportionately in this sum and it will be set aside in equity to him. The producer will be notified each year of the amount of that equity in the regular Letter of Advice so that he will at all times know the amount of money which has been set aside in his name but which will be used for the retirement of indebtedness. Again, as in the case of the Unexpended Brokerage, these sums will begin to be revolved out and paid in cash to the producer as soon as the indebtedness is retired.

(c). In addition to the above, all profits or benefits resulting from the sale of milk directly through the dairy, over and above that which would have been received by the producer if this purchase had not been made and the milk had gone into surplus, will be applied to the reduction of the debt instead of being applied to the blend price.

There will be no interest paid on these revolving funds. The only interest paid will be on actual Certificates of Indebtedness.

V. Conclusion.

In summing up the benefits and other factors, it is the considered judgment of the Board of Directors, the Management, and all other parties to whom this plan has been submitted, that the purchase is sound, the method of financing is sound, and that it is good [fol. 1837] business to make this purchase. It will bring immediate benefits in a considerable sum to the producers of the market; it will tend to make the market a better market and a sounder market, and it will protect your investments, besides giving you a very good return.

From the above it may be seen that even allowing a 50% margin for unknown conditions and contingencies, that the Association should be able to retire its indebtedness in about five years. It is certainly well worth the while of every producer and those having an interest in the producers, to back up the judgment of the Board of Directors and Management in subscribing to the amount needed for the purchase of this dairy.

Enclosure:
Maryland and Virginia Milk Producers Association 1953 Annual Report (includes financial statement)

[fol. 1838]

DEFENDANT'S EXHIBIT 64

UNITED STATES (Emblem) OF AMERICA

DEPARTMENT OF AGRICULTURE
WASHINGTON

I, EZRA TAFT BENSON, Secretary of Agriculture of the United States, pursuant to Title 28, United States Code, Section 1733, do hereby certify that the annexed copy, or each of the specified number of annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described: Letter dated October 11, 1954, addressed to Robert L. Farrington, from William J. Hughes, Jr., now on file in the Office of the General Counsel, Department of Agriculture, Washington, D. C.

In testimony whereof I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia, this 22nd day of October, 1958.

(Seal) /s/ EZRA TAFT BENSON
Secretary

By /s/ RALPH F. KOEBEL
Assistant General Counsel

(Signed pursuant to the authority of 23 F.R. 3336)

[fol. 1839]
(Letterhead of William E. Leahy, Washington 5, D. C.)

October 11, 1954

Robert L. Farrington, Esq.
Solicitor, Department of Agriculture
Room 2031 South Building
U.S. Department of Agriculture
Washington 25, D. C.

Dear Mr. Farrington:

The Antitrust Division of the Department of Justice is at present making a survey of activities of the Maryland and Virginia Milk Producers Association in respect of possible antitrust violations. That survey includes the cooperative's recent purchase of the assets of Embassy Dairy, which gives it a local retail outlet. At the time it acquired Embassy's assets the cooperative had for years been furnishing around 86% of the milk in this area. Its distributors deal with it on a day-to-day basis; it has no contracts with them. The recent purchase operated for a time to increase its percentage to 96% but the loss of a large customer has now reduced the percentage to around the old figure. However, the Department is questioning whether this purchase violates any of the provisions of the antitrust laws, and further whether the cooperative's dual capacity as wholesaler and retailer will restrain trade on the retail level. If the Department resorts to court action the case will very likely raise broad questions concerning the application of the antitrust laws to farmers cooperatives and may well result in substantially limiting the traditional exemptions which the *Capper-Volstead Act* was intended to provide.

We are writing the present letter with the request that your Department consider whether this cooperative's actions if at all questionable are not more properly a matter for your Department under the *Capper-Volstead Act* (7 U.S.C. Sec. 291, 292) which permits the operation of agricultural cooperatives and renders reasonable their restraint or monopolization of trade provided the price of the product is

not unduly enhanced. In that event the Secretary of Agriculture (not the Antitrust Division) is authorized to take corrective action by holding hearings and making findings of fact. Only after such action by Agriculture is the Department of Justice given enforcement powers (*7 U.S.C. Sec. 292*).

Since the enactment of the *Capper-Volstead Act* in 1922 the Agriculture Department has encouraged the formation and operation of cooperatives. It has done so without regard to a given cooperative's so-called "control" of the market in a [fol. 1840] given area; indeed to do its job the cooperative must be able to make its presence felt. Economists have pointed out that the most successful cooperatives handle a high percentage of the particular product in the area. Up to now no question has been raised by the Department of Justice that so called monopoly power was, in the case of a cooperative, *per se* legally objectionable. It is common knowledge that for many years numerous cooperatives have acquired such power, many of them by purchases of stock, facilities, merger, etc. Cooperatives have been led to believe that from the viewpoint of size, market control, etc. the test of the validity of their expansion was that prescribed by the *Capper-Volstead Act* namely whether their operations "unduly enhanced" the prices of agricultural products. In that event the Act places corrective power in the Secretary of Agriculture, not in the Antitrust Division.

Now, for the first time, a cooperative's acquisition of a retail outlet is being investigated from the viewpoint of whether such purchase may unduly restrain competition in violation of the antitrust laws. Such a viewpoint can only, in the end, be bottomed upon a repeal *pro tanto* of the *Capper-Volstead Act* (7 U.S.C. Sec. 292), which shows on its face that it expressly contemplates that cooperatives may restrain, indeed monopolize trade, this side of "undue enhancement" of prices. In brief the Antitrust Division's theory has the far reaching effect of a complete subversion of the public policy of the *Capper-Volstead Act*. That Act like the *Agricultural Marketing Act* and many other recent agricultural statutes is based upon a Congressional philosophy that the competitive system, as a means of getting the farmer a fair price for his products, simply won't work.

As a result these statutes validate collective action on the part of farmers which in any other field would amount to *per se* violations of the Antitrust Acts. It is therefore a mere truism, or meaningless to inquire whether a cooperative in acquiring retail facilities tends thereby substantially to lessen competition or acquire a monopoly. Assuming it does, this is precisely what the *Capper-Volstead Act* permits always assuming the acquisition does not "unduly enhance" prices.

In contrast to the policy of an agricultural economy more or less "controlled" (within limits) by the farmers themselves or by your Department the Antitrust Division is committed, and quite properly so, to a free competitive system for industry as a whole. Up to now it has never applied that system and the sanctions of the Antitrust Acts to agricultural cooperatives except where, in isolated cases such as *U.S.* v. *Borden* 308 U.S. 188, the cooperative has abdicated its job as a farmers' selling agent and joined with outside groups in a racketeering type of conspiracy aimed at the public as a whole. We have no quarrel with the *Borden* decision. What we do say is that the act of a cooperative in its own [fol. 1841] interest, in acquiring a retail outlet for its farmers milk, is immunized by the *Capper-Volstead Act* unless and until your Department finds an undue enhancement of prices. Such a purchase is within the philosophy enunciated by the agricultural statutes and outside the philosophy of free competition found in the Antitrust Acts. What disturbs us and will disturb the farmers' cooperative movement as a whole is whether the Antitrust policy will override the agricultural policy. Or are we destined to an era of impossible pulling and hauling between two government departments committed to contradictory policies, a situation severely criticized by our Court of Appeals in *Wittek* v. *U.S.*, 171 F. (2) 8, 11). In brief are agricultural cooperatives faced with a day to day supervision of their acts by the Antitrust Division wherein the legality of their activities will be tested by whether they tend to restrain trade, or incline to monopoly? If so the labor of the past decade and your Department's consistent encouragement of farmers' cooperatives has gone in vain. Cooperatives

are faced with the appalling thought that they all may be and may have been operating for the past thirty years, in violation of law. The millions of dollars invested in them, or loaned to them by governmental agencies such as the Farm Credit Administration, will be constantly at the hazard of court action. If that is what farmers must face they should know it and know it now.

We think therefore that a high policy decision must be made by this administration and made on the highest level. That decision will be whether the charter of farmers' cooperatives is still the *Capper-Volstead Act* and whether that Act still permits collective action involving restraints and even monopoly this side of undue enhancement of prices. Or is that polity being abandoned in favor of subjecting cooperatives to the tests of the competitive system, wherein their acts will be assayed by whether or not they restrain trade, or adversely affect competition, or involve monopoly power, etc., with no standard to guide them. We bring the matter to the attention of your Department at the threshold and ask that the question be settled with a clear realization of its importance and wide consequences.

Very truly yours,

/s/ Wm. J. Hughes, Jr.
William J. Hughes, Jr.,
Attorney for Maryland and Virginia Milk
Producers Association, Inc.

WJH:w

[fol. 1842]

DEFENDANT'S EXHIBIT 65

UNITED STATES (Emblem) OF AMERICA

DEPARTMENT OF AGRICULTURE
WASHINGTON

I, EZRA TAFT BENSON, Secretary of Agriculture of the United States, pursuant to Title 28, United States Code, Section 1733, do hereby certify that the annexed copy, or

each of the specified number of annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described:

1. File copy of a letter dated December 10, 1954, addressed to Mr. William J. Hughes, Jr., William E. Leahy Law Offices, 821 Fifteenth Street, N.W., Washington 5, D. C., by R. L. Farrington, Solicitor; and
2. File copy of a letter dated December 10, 1954, addressed to The Honorable, The Attorney General, by R. L. Farrington, Solicitor.

In testimony whereof I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia, this 13th day of November, 1958.

(Seal) /s/ EZRA TAFT BENSON
Secretary

By /s/ RALPH F. KOEBEL
Assistant General Counsel

(Signed pursuant to the authority of 23 F.R. 3336)

[fol. 1843] December 10, 1954

Mr. William J. Hughes, Jr.
William E. Leahy Law Offices
821 Fifteenth Street, N. W.
Washington 5, D. C.

Dear Mr. Hughes:

This refers to your letter of October 11 and the meeting you and Mr. Garstang had with me in regard to the investigation by the Antitrust Division of the Department of Justice with respect to the activities of the Maryland-Virginia Milk Producers Association.

We have sent a letter to the Attorney General in regard to the purchase of Embassy Dairy by the Maryland-Virginia Milk Producers Association, informing him of the information that the Department of Agriculture had about the matter.

I am enclosing a copy of that letter for your information and am also sending a copy to Mr. Garstang.

Sincerely yours,

R. L. FARRINGTON
R. L. Farrington
Solicitor

Enclosure

cc: Mr. Marion R. Garstang, Counsel
National Milk Producers Federation
1731 Eye Street, N. W.
Washington 6, D. C.
cc: Mr. Koebel
RLFarrington:htk
12/9/54
19612

[fol. 1844] December 10, 1954

The Honorable
The Attorney General

Dear Mr. Attorney General:

This office has received information from two attorneys, Mr. W. J. Hughes, Jr., an associate of the law firm of William E. Leahy of Washington, D. C., and Mr. Marion Garstang, also of Washington, that a survey is being conducted by your Department of the activities of the Maryland-Virginia Milk Producers Association, regarding a possible anti-trust violation.

These attorneys believe that the investigation may be in part attributable to the recent purchase by the cooperative of assets of the Embassy Dairy, Washington, D. C., to provide it with a retail outlet. We are informed by the Farmer Cooperative Service of this Department that it was aware of the acquisition of the Embassy Dairy by the cooperative, and that in accordance with its responsibilities under the Act of July 2, 1926 (7 U.SC. 451-457), the Farmer Cooperative Service afforded some advisory assistance in evaluating the economic implications of the transaction.

The Department is informed that the purchase was made for the purpose of enabling the cooperative to gain better information regarding the retail market; to bargain more effectively; and to serve its members more advantageously. The Department has not received any information which would indicate that the activities of the cooperative in connection with Embassy Dairy have constituted a violation of the Capper-Volstead Act (7 U.S.C. 292). We wished you to be advised of our activities in respect to this matter.

Sincerely yours,

R. L. FARRINGTON
R. L. Farrington
Solicitor

RFKoebel:RLFarrington:htk
12/9/54

2 cc: Farmer Coop. Service (Dr. Knapp)
cc: William J. Hughes, Jr.
Marion R. Garstang

[fol. 1845]

DEFENDANT'S EXHIBIT 66

UNITED STATES DEPARTMENT OF AGRICULTURE
Office of the Secretary
Washington 25, D. C.

July 23, 1953

MEMORANDUM No. 1332

ASSIGNMENT OF SECRETARY'S RESPONSIBILITIES UNDER THE CAPPER-VOLSTEAD ACT

Section 1 of the Capper-Volstead Act (7 U.S.C. 291) grants farmers' cooperative marketing associations which meet prescribed terms and conditions a limited exemption from the antitrust acts. Section 2 of the Act (7 U.S.C. 292) provides that if the Secretary of Agriculture has reason to believe that such a farmers' cooperative marketing association has monopolized or restrained trade in interstate or foreign commerce to such an extent that the price of any agricultural product has been "unduly en-

hanced by reason thereof," the Secretary shall serve a complaint on the association. If, following a hearing (which must be held if action is to be taken), the Secretary concludes that the association has thus monopolized or restrained trade, he shall issue a cease and desist order. If the association fails to abide by the order a certified copy of the order is to be filed with the district court in the district where the association has its principal place of business and notice given to the association and the Attorney General. The Department of Justice then takes charge of enforcing the order.

The responsibility for initiating appropriate action pursuant to section 2 of the Capper-Volstead Act, based upon either complaints from the public or factual information available to any agency of the Department that a cooperative marketing association meeting the prescribed conditions of that Act, or any marketing agency referred to in section 1 of the Act, may be violating section 2 thereof, is hereby assigned to the Office of the Solicitor. Each agency in the Department shall submit to the Office of the Solicitor any complaint from the public or a memorandum of any facts coming to its attention indicating a possible violation of section 2 of that Act.

The Office of the Solicitor shall consult with any other appropriate agency within the Department and may utilize the services of the Compliance and Investigation Branch of the Production and Marketing Administration, if necessary, for the purpose of developing preliminary informa- [fol. 1845a] tion. A report on the case, with the Solicitor's recommendation, shall then be submitted to the Secretary for a determination as to whether a complaint should be served. If the Secretary decides to proceed, the Office of the Solicitor will take the necessary steps to hold a hearing, and will represent the Department in all phases of the proceeding until the enforcement of any cease and desist order which might be issued is placed in charge of the Department of Justice.

/s/ Ezra Taft Benson
Secretary

[fol. 1846]

Defendant's Exhibit 67

Defendant's Requests for Admissions

131. The Attorney General did not, prior to the institution of the instant proceeding, request the Secretary of Agriculture to proceed against the Maryland and Virginia Milk Producers Association, Inc. under the authority conferred upon the Secretary by Section 2 of the Capper-Volstead Act (42 Stat. 388: 7 U.S.C. § 292).

132. The Secretary of Agriculture did not request the Attorney General to institute the instant proceeding.

133. The Secretary of Agriculture has never instituted against the Maryland and Virginia Milk Producers Association, Inc. a proceeding under Section 2 of the Capper-Volstead Act.

Plaintiff's Answers

131. Admitted.

132. Admitted.

133. Admitted.

[fol. 1847]

SUPREME COURT OF THE UNITED STATES

Nos. 898 and 942—October Term, 1958

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., Appellant,

vs.

UNITED STATES; and
UNITED STATES, Appellant,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

ORDER NOTING PROBABLE JURISDICTION—June 29, 1959

Appeals from the United States District Court for the District of Columbia.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and one hour allowed each side for oral argument.

[fol. 1736]

Dec. 31, 1954

Shows unamortized cost of
non-competitive agreement
as $958,333.33 and
Embassy Good Will purchased
as $530,562.67

[fol. 1737]

PLAINTIFF'S EXHIBIT 47

(Letterhead of Michigan Milk Producers' Association, Detroit 2, Mich.)

February 3, 1955

B. B. Derrick, Secretary-Treasurer
Maryland and Virginia Milk Producers Assn
1756 K Street, N.W.
Washington 6, D.C.

Dear Mr. Derrick:

From time to time our delegates raise the question as to why the Association does not distribute milk in the Detroit area or in some of its other markets, and our people have more or less taken the position for an association to be both a dealer and a bargaining agency.

Knowing that you were once in the distributing business and are now again in competition with your handlers, I should like your reaction as to what circumstances you feel warrant an association entering the distributing business in competition with the dealers with whom it deals, and what complications might be expected.

I will appreciate whatever information you can give me on this subject, both as to your experience and your personal views.

Very truly yours,

MICHIGAN MILK PRODUCERS ASSOCIATION

HFS:ef

/s/ H. F. SIMMONS
H. F. Simmons
Secretary-Manager

[fol. 1738]

PLAINTIFF'S EXHIBIT 48

February 8, 1955

Mr. H. F. Simmons, Secretary-Manager
Michigan Milk Producers' Association
406 Stephenson Building
Detroit 2, Michigan

Dear Mr. Simmons:

I have your letter of February 3 and you really post a difficult question for me to answer.

The first plant we "inherited" in 1940 was a small one that we had to take over as the result of bankruptcy. The second one which we have just taken over as of August 1, 1954, was one that we felt we had to buy for self protection; the former owners of which had repeated their activities once executed in the Chicago Market and since 1930 in the Washington Market to the extent that from our standpoint everyone in the distributing field would be happy to have them out of the market. It did give us an additional outlet for a sizable amount of milk which we did not have under prior conditions inasmuch as they were buying independent milk.

The first plant wound up with a nice profit after four years and two months of operation and was sold to a purchaser who continued to take his full supply of milk from us, for a period of fourteen years. It was then sold to another buyer who is again purchasing his milk independently.

There isn't any doubt but that our second purchase has improved market conditions in our area and is being accepted by buyers to whom we sell milk.

Now as to my personal views I would strongly recommend that the purchase of distributing plants be executed only in

a case where the elimination of the plant as an independent buyer would furnish an outlet for a sizable amount of milk. As you know, I have never been entirely sold on the idea of producer organizations getting into the distributing end of the business and the two occasions that we have gotten into it have been explained above. Unless you have some troublesome distributors in your market I would strongly recommend that you continue your operation as in the past.

Very truly yours,

B. B. DERRICK
Secretary-Treasurer

1739]

PLAINTIFF'S EXHIBIT 86

TIO OF NET INCOME BEFORE AND AFTER TAXES AND OF NET OPERATING PROFIT TO NET WORTH AND NET SALES OF EMBASSY DAIRY, INC., 1952–1954

RATIO *Worth to Income*	*1952*	*1953*	*1954*	*Average (3 yr. period)*
Net Worth (Beginning of Period)	$1,009,497.10	$1,034,481.54	$1,112,030.72	$1,052,003.15
Net Income (Before Taxes)	41,610.96	156,661.19	38,332.50	78,868.24
Ratio	4.12%	15.14%	3.44%	7.49%
Net Income (After Taxes)	24,927.97	76,579.69	21,132.50	40,880.08
Ratio	2.46%	7.40%	1.90%	3.88%

RATIO *es to Profits*				
Net Sales	$6,055,616.72	$6,065,225.04	$5,258,372.43	$5,793,071.42
Net Operating Profit	65,924.12	173,275.19	31,447.15	90,215.51
Ratio	1.08%	2.85%	0.59%	1.55%
Net Income (Before Taxes)	41,610.96	156,661.19	38,332.50	78,868.24
Ratio	0.68%	2.58%	0.72%	1.36%
Net Income (After Taxes)	24,927.97	76,579.69	21,132.50	40,880.08
Ratio	0.41%	1.26%	0.40%	0.70%

E: 1954 Profits above are after deduction of profit on sales of Assets, Goodwill and Investments.

RCE: Balance Sheets and Profit and Loss Statements of Embassy Dairy, Inc., for fiscal years 1951–1954.

[fol. 1740]

PLAINTIFF'S EXHIBIT 87

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.
EMBASSY DAIRY DIVISION
PROFIT AND LOSS STATEMENT DATA

Period Ending	*Net Sales*	*Operating Expenses*	*Net Operat Los*
12-31-54 (8-1-54 to 12-31-54)	$2,449,667.89	$2,838,209.40	$(388,54
12-31-55 (Full Year)	5,741,243.70	6,303,996.19	(562,75
12-31-56 (Full Year)	5,735,429.20	6,148,172.19	(412,74
3-31-57 (1-1-57 to 3-31-57)	1,707,941.08	1,757,129.86	(49,18

SOURCE: Profit and Loss Statements of Embassy Dairy Division of Mar and Virginia Milk Producers Association, Inc., for period 1954-1

INDEPENDENT PRODUCERS SUPPLYING EMBASSY DAIRY, INC., PRIOR TO ACQUISITION AND THOSE 1/ SUPPLYING MILK IN THE WASHINGTON METROPOLITAN AREA INDEPENDENTLY OF THE ASSOCIATION AFTER ACQUISITION, SEPTEMBER 1954 - 1957

	No. Shipping to Embassy Dairy, Inc.	No. Shipping to Thompson's	No. Who Are Members of Capitol Milk Prod. Assoc.	Total Supplying Milk Independently of Association
1954				
January	119			119
February	119			119
March	120			120
April	124			124
May	123			123
June	122			122
. . . . .	Acquisition of Embassy by Defendant			. . . . .
September		3	11	14
October		4	13	17
November		4	13	17
December		4	13	17
1955				
January		4	13	17
February		4	13	17
March		4	13	17
April		4	13	17
May		4	13	17
June		4	13	17
July		4	13	17
August		4	13	17
September		4	14	18
October		4	13	17
November		6	14	18
December		9	14	20
				23
1956				
January		9	14	23
February		13	14	27
March		13	14	27
April		15	15	30
May		18	15	33
June		22	15	37
July		23	15	38
August		25	15	40
September		26	15	41
October		26	15	41
November		26	15	41
December		27	15	42

[fol. 1741]

1956			
January	9	14	23
February	13	14	27
March	13	14	27
April	15	15	30
May	18	15	33
June	22	15	37
July	23	15	38
August	25	15	40
September	26	15	41
October	26	15	41
November	26	15	41
December	27	15	42
1957			
January	28	15	43
February	29	14	43
March	31	13	44
April	33	13	46
May	33	12	45
June	33	12	45
July	33	12	45
August	33	12	45
September	33	12	45
October	33	12	45
November	33	12	45
December	31	13	44

1/ As of May, 1954.

SOURCE: Defendant's admissions Nos. 1050, 1252-1268, 1270-1276, 1279-1363, 1365, 1367-1368, 1482-1484, 1535-1536.

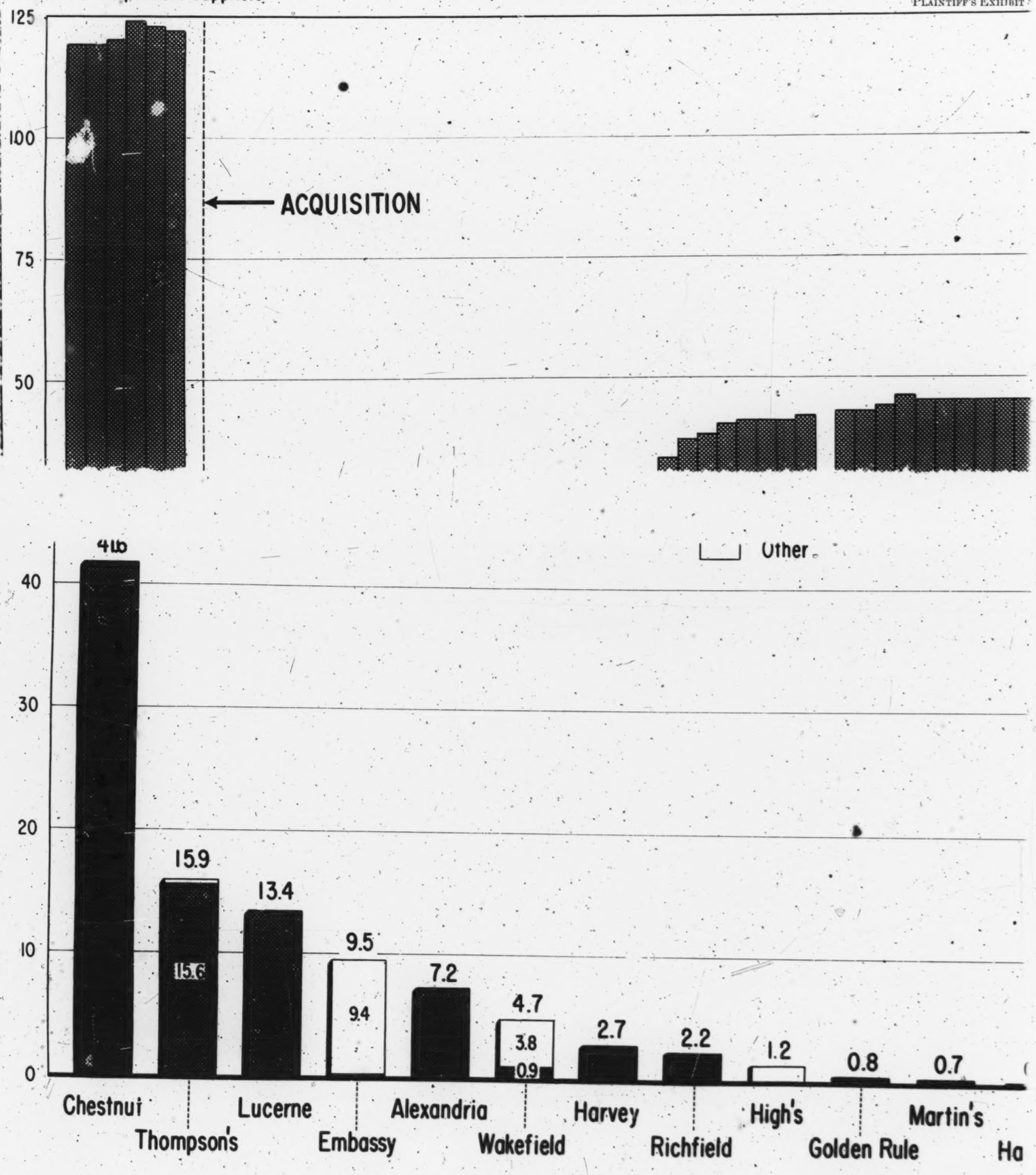
[fol. 1741]

PLAINTIFF'S EXHIBIT 88

INDEPENDENT SUPPLIERS OF EMBASSY DAIRY, INC., PRIOR TO ACQUISIT AND THOSE[1] SUPPLYING MILK IN THE WASHINGTON METROPOLITAN A INDEPENDENTLY OF THE ASSOCIATION AFTER ACQUISITION, 1954 - 19

630
[fol. 1742]

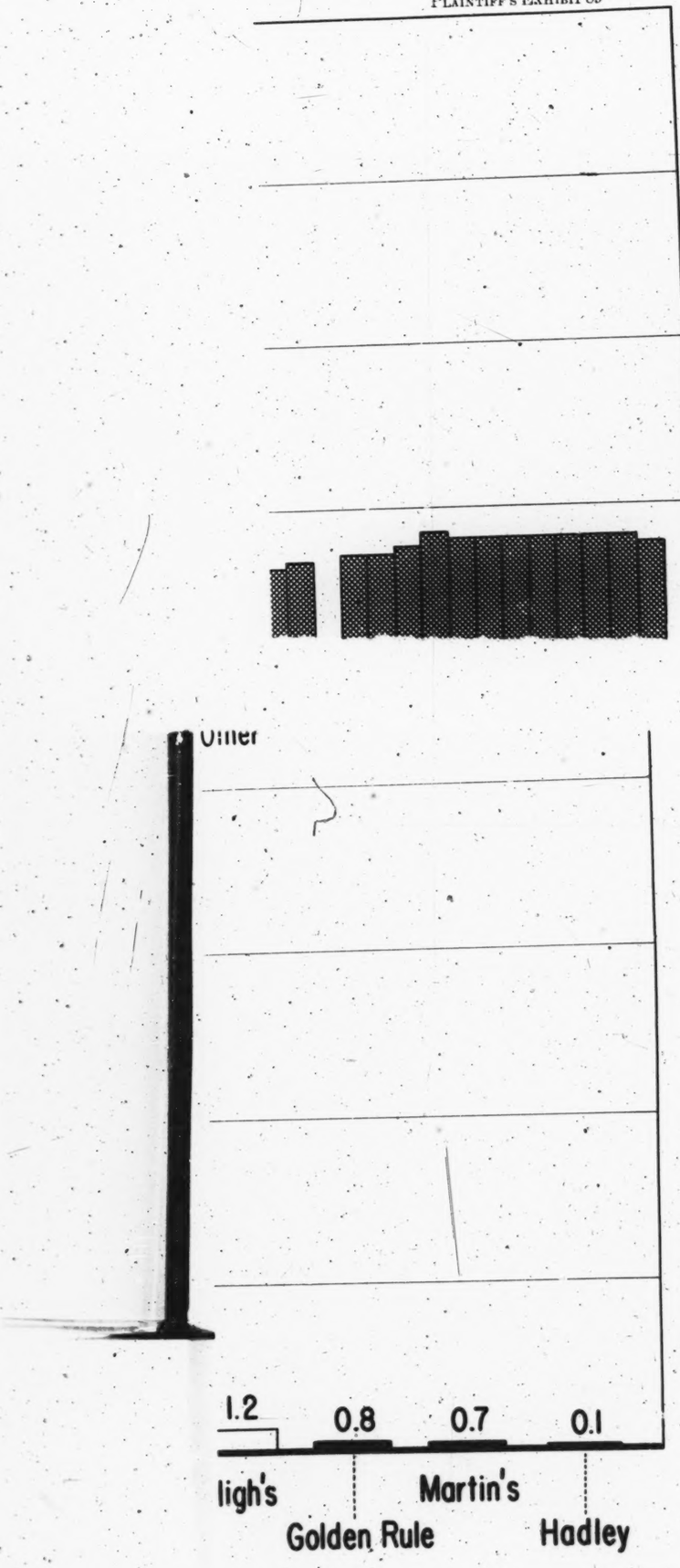
PLAINTIFF'S EXHIBIT

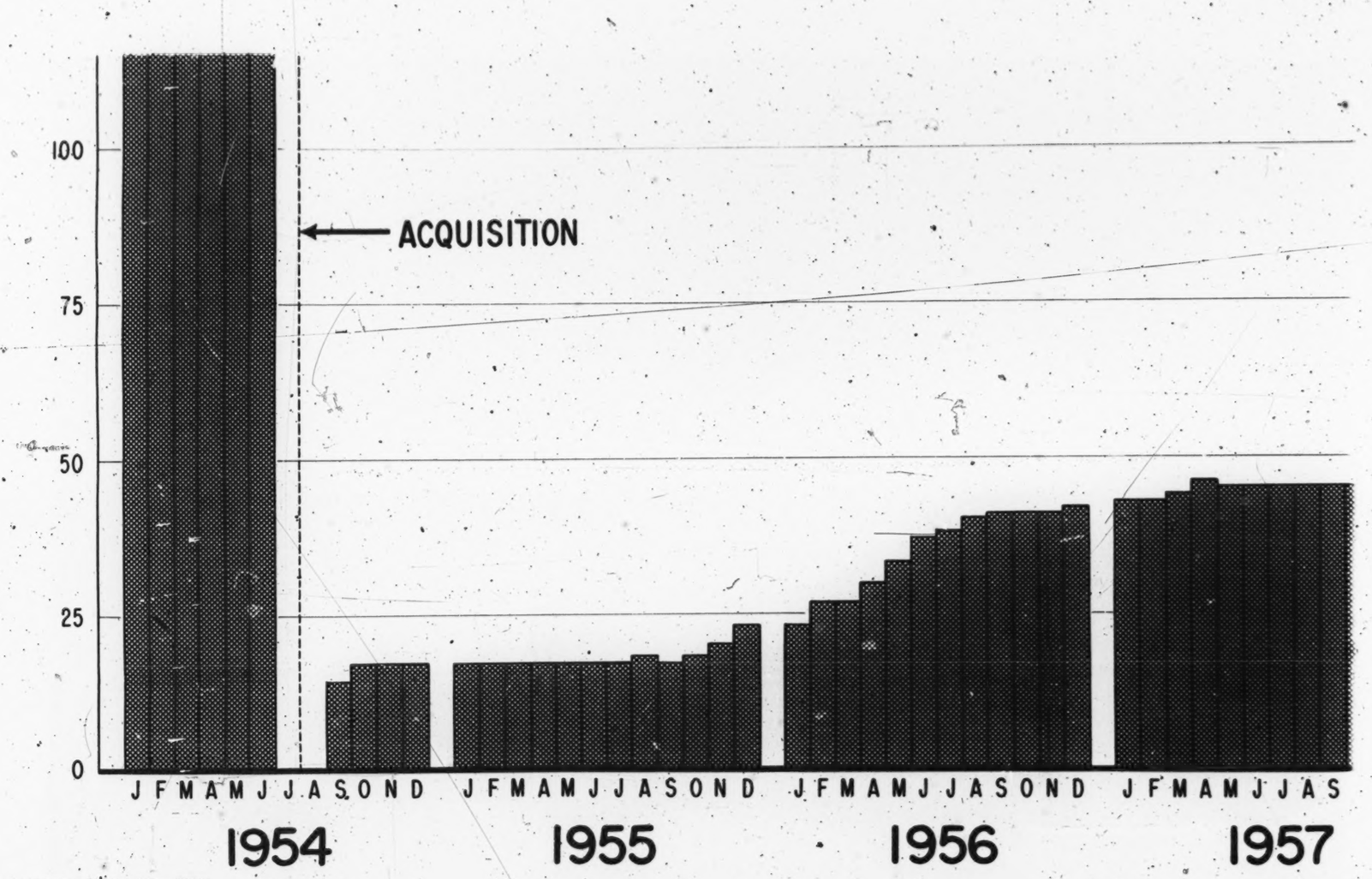


RIOR TO ACQUISITION METROPOLITAN AREA ISITION, 1954 - 1957

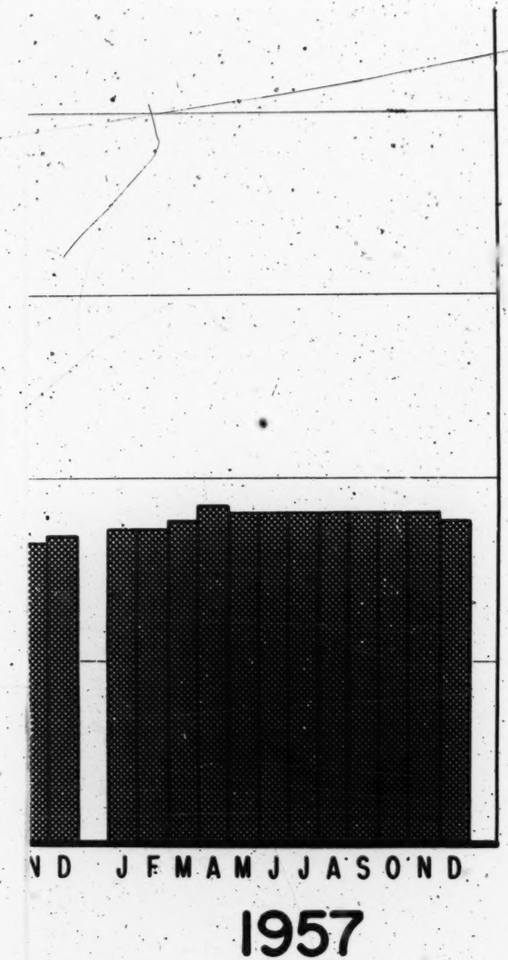
630
[fol. 1742]

PLAINTIFF'S EXHIBIT 89





[1] As of May 1954



[fol. 1743]

PLAINTIFF'S EXHIBIT 90

RANKING AND RELATIVE SIZE OF DEALERS IN THE WASHINGTON METROPOLITAN AREA BASED ON THEIR PURCHASES OF MILK FOR RESALE AS FLUID MILK, JANUARY - JUNE, 1954

(All Non-Percentage Figures in Thousands of Pounds; All Percentage Figures Relate to Grand Total.)

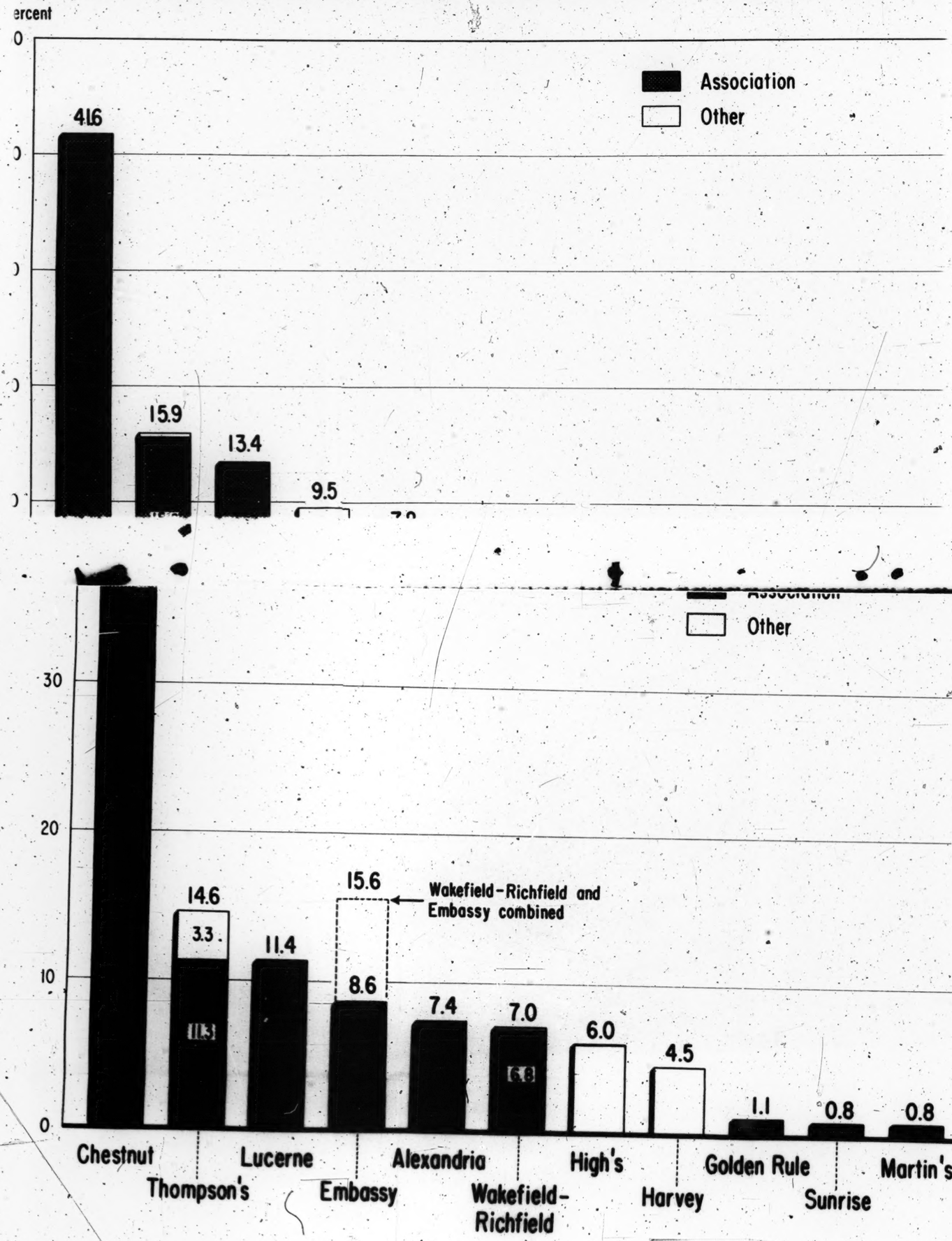
Dealers	Total	%	From Assoc.	%	From Others	%
1. Chestnut Farms	119,233	41.6	119,233	41.6	-	-
2. Thompson's	45,474	15.9	44,633	15.6	841	0.3
3. Lucerne	38,367	13.4	38,367	13.4	-	-
4. Embassy	27,184	9.5	234	0.1	26,948	9.4
5. Alexandria	20,577	7.2	20,577	7.2	-	-
6. Wakefield	13,495	4.7	2,669	0.9	10,825	3.8
7. Harvey	7,835	2.7	7,835	2.7	-	-
8. Richfield	6,398	2.2	6,398	2.2	-	-
9. High's	3,587	1.2	-	-	3,587	1.2
10. Golden Rule	2,233	0.8	2,233	0.8	-	-
11. Martin's	2,082	0.7	2,082	0.7	-	-
12. Hadley	346	0.1	-	-	346	0.1
GRAND TOTAL ALL DEALERS	286,806	100.0	244,257	85.2	42,547	14.8

SOURCE: Table C, Stipulation No. 11.

632
[fol. 1744]

PLAINTIFF'S EX

RELATIVE SIZE OF DEALERS IN THE WASHINGTON METROPOLITAN AR
ASED ON THEIR PURCHASES OF MILK FOR RESALE AS FLUID MILK, JAN.-JUN



632
[fol. 1744]

PLAINTIFF'S EXHIBIT 91

METROPOLITAN AREA
FLUID MILK, JAN.-JUNE 1954

PURCHASES BY ALL DAIRIES LOCATED IN THE WASHINGTON METROPOLITAN AREA OF MILK FOR RESALE AS FLUID MILK, 1954
(All Non-Percentage Figures in Thousands of Pounds
All Percentage Figures Relate to Grand Total)

	GRAND TOTAL						Chestnut						Thompson's						Lucerne					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.
January	39,614	84.8	7,142	15.2	46,757	100.0	18,060	38.6	-	-	18,060	38.6	7,622	16.3	156	0.3	7,779	16.6	7,469	16.0	-	-	7,469	16.0	31
February	36,406	84.5	6,661	15.5	43,067	100.0	17,579	40.8	-	-	17,579	40.8	6,993	16.2	136	0.3	7,129	16.5	5,674	13.2	-	-	5,674	13.2	78
March	41,638	84.9	7,406	15.1	49,044	100.0	20,011	40.8	-	-	20,011	40.8	7,879	16.1	142	0.3	8,021	16.4	6,719	13.7	-	-	6,719	13.7	42
April	41,961	85.0	7,405	15.0	49,366	100.0	21,019	42.7	-	-	21,019	42.7	7,401	15.0	127	0.3	7,528	15.3	6,436	13.0	-	-	6,436	13.0	-
May	43,447	85.7	7,251	14.3	50,699	100.0	21,847	43.1	-	-	21,847	43.1	7,787	15.4	150	0.3	7,935	15.7	6,036	11.9	-	-	6,036	11.9	-
June	41,191	86.0	6,682	14.0	47,873	100.0	20,717	43.3	-	-	20,717	43.3	6,951	14.5	130	0.3	7,081	14.8	6,073	12.7	-	-	6,073	12.7	83
July	43,730	92.5	3,545	7.5	47,275	100.0	20,558	43.5	-	-	20,558	43.5	6,672	14.1	120	0.3	6,791	14.4	6,105	12.9	-	-	6,105	12.9	3,784
August	44,675	94.4	2,665	5.6	47,340	100.0	20,011	42.5	-	-	20,011	42.5	6,592	14.0	183	0.4	6,775	14.4	6,209	13.2	-	-	6,209	13.2	5,089
September	46,032	93.7	3,084	6.3	49,116	100.0	20,546	41.9	-	-	20,546	41.9	7,478	15.2	223	0.5	7,701	15.7	6,161	12.5	-	-	6,161	12.5	4,638
October	48,118	91.2	4,640	8.8	52,758	100.0	22,568	42.8	-	-	22,568	42.8	7,733	14.7	275	0.5	8,008	15.2	6,513	12.3	-	-	6,513	12.3	4,377
November	45,985	91.5	4,280	8.5	50,265	100.0	21,304	42.5	-	-	21,304	42.5	7,336	14.6	287	0.6	7,624	15.2	6,281	12.5	-	-	6,281	12.5	4,400
December	46,931	91.2	4,512	8.8	51,444	100.0	21,962	42.7	-	-	21,962	42.7	7,202	14.0	135	0.6	7,837	15.2	6,339	12.3	-	-	6,339	12.3	4,480
TOTAL	519,470	88.8	65,272	11.2	584,742	100.0	246,183	42.1	-	-	246,183	42.1	87,947	15.0	2,264	0.4	90,211	15.4	75,977	13.0	-	-	75,977	13.0	27,001

	Wakefield						Berry						Richfield						High's					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.
January	239	0.5	1,662	3.9	1,901	4.0	1,346	2.9	-	-	1,346	2.9	931	2.0	-	-	931	2.0	-	-	614	1.3	614	1.3	333
February	194	0.4	1,668	3.9	1,822	4.3	1,227	2.8	-	-	1,227	2.8	862	2.0	-	-	862	2.0	-	-	532	1.8	532	1.2	323
March	423	0.8	1,866	3.8	2,279	4.6	1,433	2.9	-	-	1,433	2.9	903	1.8	-	-	903	1.8	-	-	585	1.2	585	1.2	369
April	583	1.2	1,872	3.8	2,456	5.0	1,326	2.7	-	-	1,326	2.7	888	1.8	-	-	888	1.8	-	-	607	1.2	607	1.2	360
May	444	0.9	2,055	4.1	2,499	5.0	1,136	2.7	-	-	1,136	2.7	1,750	3.1	-	-	1,750	3.1	-	-	653	1.3	653	1.3	358
June	836	1.7	1,702	3.6	2,538	5.3	1,167	2.4	-	-	1,167	2.4	1,264	2.6	-	-	1,264	2.6	-	-	595	1.2	595	1.2	339
July	541	1.1	1,553	3.3	2,094	4.	1,145	2.4	-	-	1,145	2.4	763	1.6	-	-	763	1.6	-	-	585	1.2	585	1.2	343
August	381	0.8	1,746	3.7	2,126	4.5	1,152	2.4	-	-	1,152	2.4	848	1.8	-	-	848	1.8	-	-	673	1.4	673	1.4	344
September	116	0.6	1,882	3.8	2,198	4.4	1,298	2.7	275	0.6	1,573	3.3	1,090	2.2	-	-	1,090	2.2	-	-	680	1.3	680	1.3	324
October	865	1.6	1,865	3.6	2,730	5.2	-	-	1,763	3.3	1,763	3.3	1,326	2.5	-	-	1,326	2.5	-	-	680	1.3	680	1.3	409
November	610	1.2	1,772	3.5	2,382	4.7	-	-	1,630	3.2	1,630	3.2	1,213	2.4	-	-	1,213	2.4	-	-	513	1.0	513	1.0	388
December	668	1.3	1,930	3.8	2,598	5.1	-	-	1,630	3.2	1,630	3.2	1,260	2.5	-	-	1,260	2.5	-	-	743	1.1	743	1.1	369
TOTAL	6,049	1.0	21,573	3.7	27,622	4.7	11,429	2.0	5,306	.9	16,735	2.9	12,918	2.2	-	-	12,918	2.2	-	-	7,230	1.3	7,230	1.3	4,330

	Dealer					
	From Assoc.	%	From Others	%	Total	%
January	-	-	42	0.1	42	0.1
February	-	-	46	0.1	46	0.1
March	-	-	39	0.1	39	0.1
April	-	-	68	0.1	68	0.1
May	-	-	69	0.1	69	0.1
June	-	-	68	0.1	68	0.1
July	-	-	61	0.1	61	0.1
August	-	-	63	0.1	63	0.1
September	-	-	94	0.1	94	0.1
October	-	-	98	0.1	98	0.1
November	-	-	77	0.2	77	0.2
December	-	-	67	0.1	67	0.1
TOTAL	-	-	725	0.1	725	0.1

	Falmouth						Alexandria					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
January	4,668	10.0	-	-	4,668	10.1	3,221	6.9	-	-	3,221	6.9
February	4,680	10.0	-	-	4,680	10.2	3,357	7.3	-	-	3,357	7.3
March	4,734	9.7	-	-	4,734	9.8	3,471	7.1	-	-	3,471	7.1
April	4,736	9.6	-	-	4,736	9.8	3,580	7.3	-	-	3,580	7.3
May	4,365	8.5	-	-	4,365	8.5	3,732	7.3	-	-	3,732	7.3
June	4,187	8.8	-	-	4,187	8.8	3,481	7.2	-	-	3,481	7.2
July	1,885	8.6	-	-	1,885	8.6	3,491	7.4	-	-	3,491	7.4
August	-	-	-	-	-	-	3,487	7.4	-	-	3,487	7.4
September	-	-	-	-	-	-	3,708	7.6	-	-	3,708	7.6
October	-	-	-	-	-	-	3,494	7.4	-	-	3,494	7.4
November	-	-	-	-	-	-	3,726	7.9	-	-	3,726	7.9
December	-	-	-	-	-	-	3,388	7.6	-	-	3,388	7.6
TOTAL	29,175	9.4	1,898	8.7	31,073	9.4	43,055	7.4	-	-	43,055	7.4

	Martin's						Golden Rule					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
January	-	-	333	0.7	333	0.7	352	0.8	-	-	352	0.8
February	-	-	323	0.8	323	0.8	352	0.8	-	-	352	0.8
March	-	-	359	0.8	359	0.8	400	0.8	-	-	400	0.8
April	-	-	350	0.7	350	0.8	388	0.8	-	-	388	0.8
May	-	-	326	0.7	326	0.8	388	0.8	-	-	388	0.8
June	-	-	339	0.7	339	0.7	341	0.7	-	-	341	0.7
July	-	-	323	0.7	323	0.7	389	0.8	-	-	389	0.8
August	-	-	344	0.7	344	0.7	351	0.8	-	-	351	0.8
September	-	-	356	0.8	356	0.8	401	0.8	-	-	401	0.8
October	-	-	409	0.8	409	0.8	436	0.8	-	-	436	0.8
November	-	-	388	0.8	388	0.8	417	0.8	-	-	417	0.8
December	-	-	360	0.7	360	0.8	442	0.8	-	-	442	0.8
TOTAL	-	-	4,330	0.7	4,330	0.8	4,837	0.8	-	-	4,837	0.8

[fol. 1745]

PLAINTIFF'S EXHIBIT 92

RANKING AND RELATIVE SIZE OF DEALERS IN THE WASHINGTON METROPOLITAN AREA BASED ON THEIR PURCHASES OF MILK FOR RESALE AS FLUID MILK, JANUARY - NOVEMBER 1957

(All Non-Percentage Figures in Thousands of Pounds)

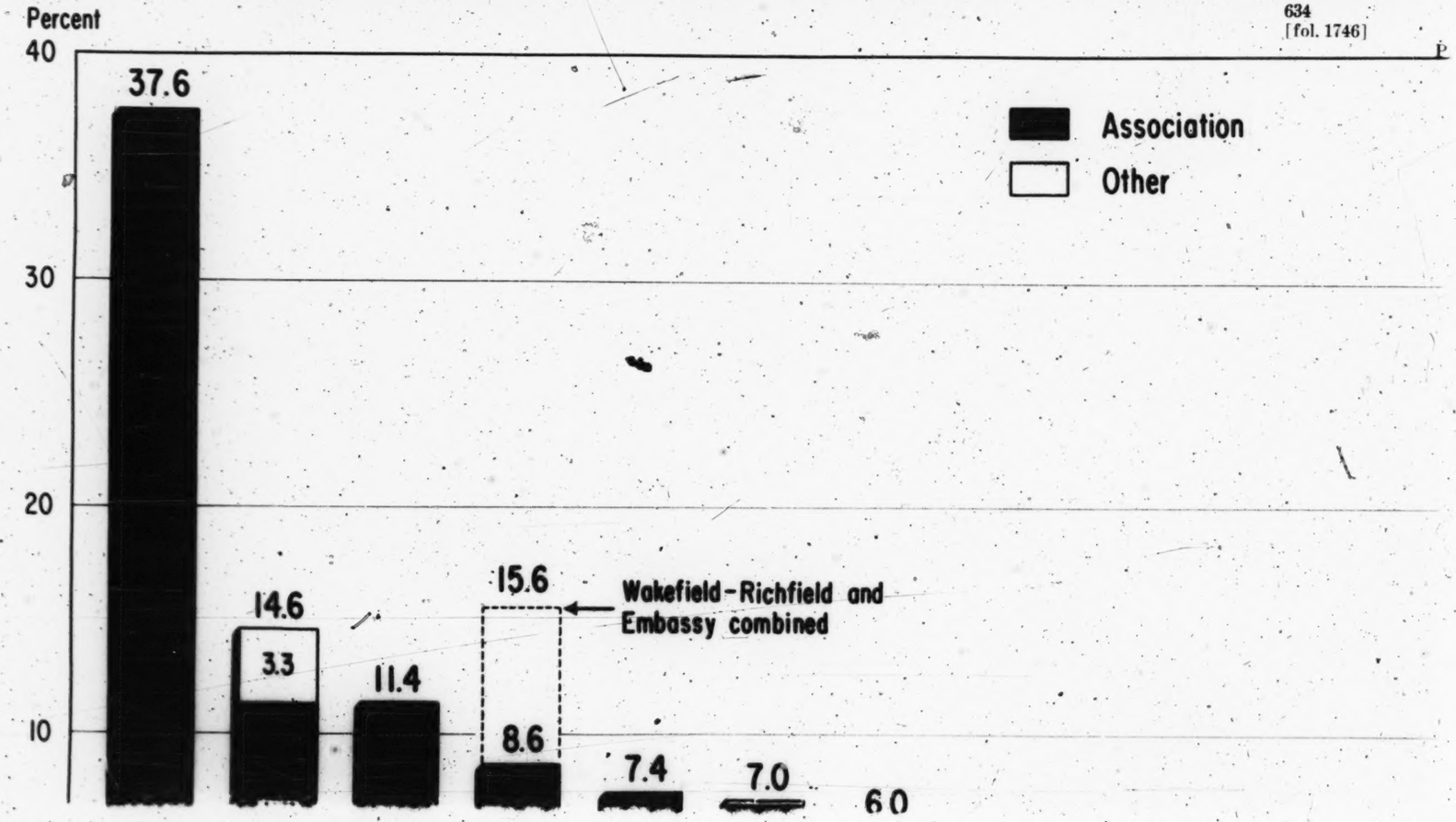
Dealers	Total	%	From Assoc.	%	From Others	%
Chestnut Farms	236,314	37.6	236,314	37.6	-	-
Thompson's	91,409	14.6	70,764	11.3	20,645	3.3
Lucerne	71,476	11.4	71,476	11.4	-	-
Embassy	54,017	8.6	54,017	8.6	-	-
Alexandria	46,306	7.4	46,306	7.4	-	-
Wakefield - Richfield	43,631	7.0	42,617	6.8	1,014	0.2
High's	37,901	6.0	247	*	37,654	6.0
Harvey	28,171	4.5	-	-	28,171	4.5
Golden Rule	7,299	1.1	7,299	1.1	-	-
Sunrise	5,156	0.8	5,099	0.8	57	*
Martin's	4,991	0.8	4,991	0.8	-	-
Hadley	1,194	0.2	416	0.1	778	0.1
GRAND TOTAL ALL DEALERS	627,865	100.0	539,546	85.9	88,319	14.1

* Less than 0.05%

SOURCE: Table I, Stipulation No. 11.

RELATIVE SIZE OF DEALERS IN THE WASHINGTON METROPOLITAN A
BASED ON THEIR PURCHASES OF MILK FOR RESALE AS FLUID MILK, JAN.-N

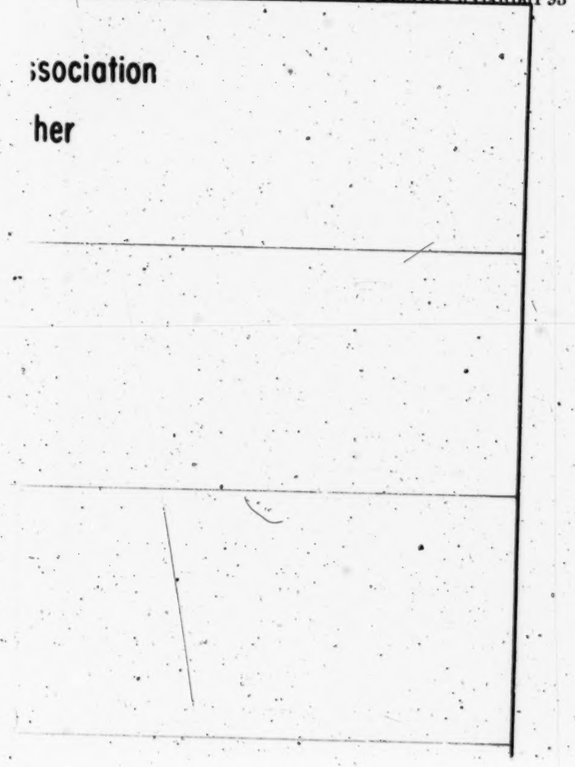
634
[fol. 1746]



METROPOLITAN AREA
LUID MILK, JAN.-NOV. 1957

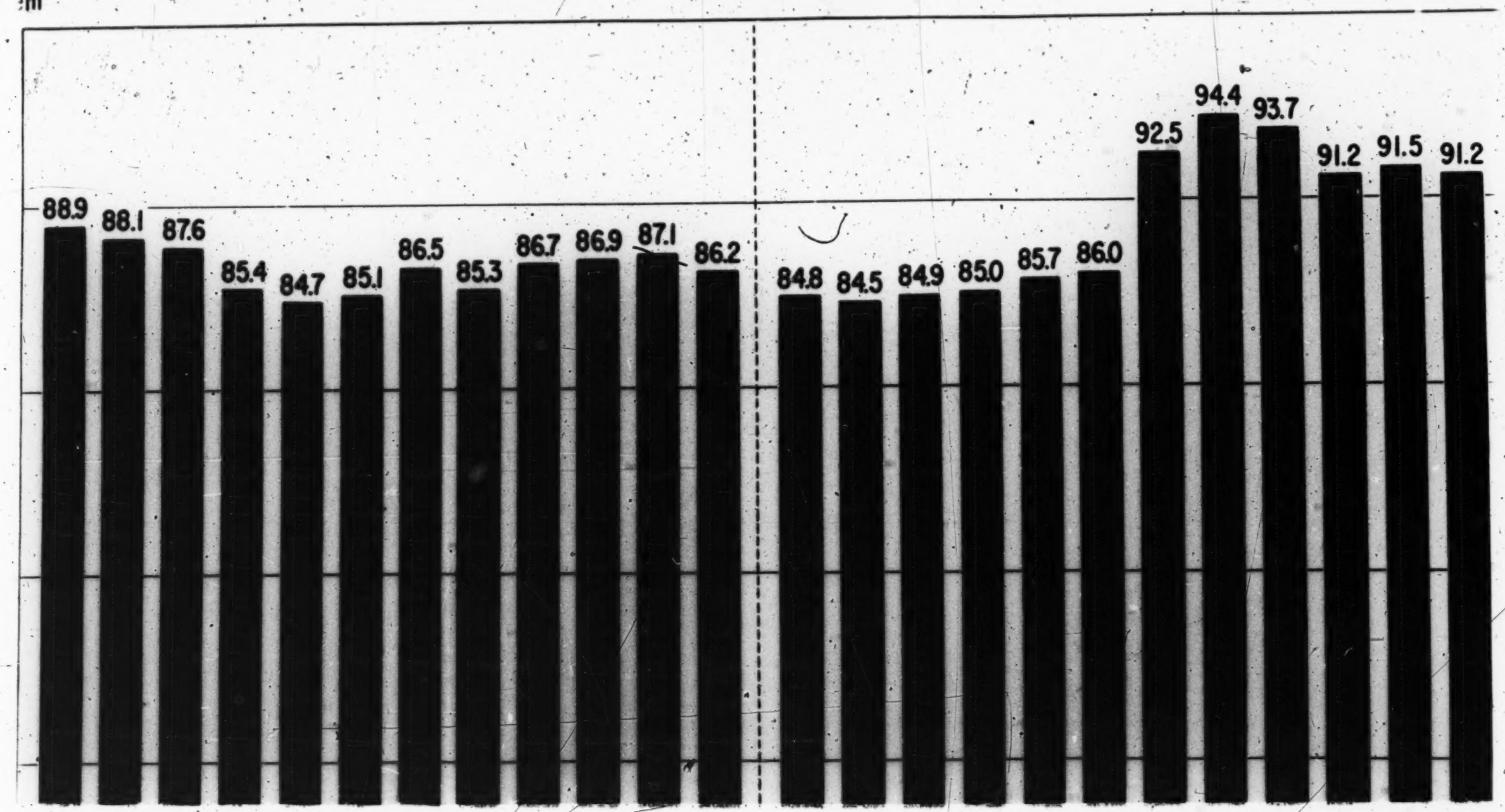
634
[fol. 1746]

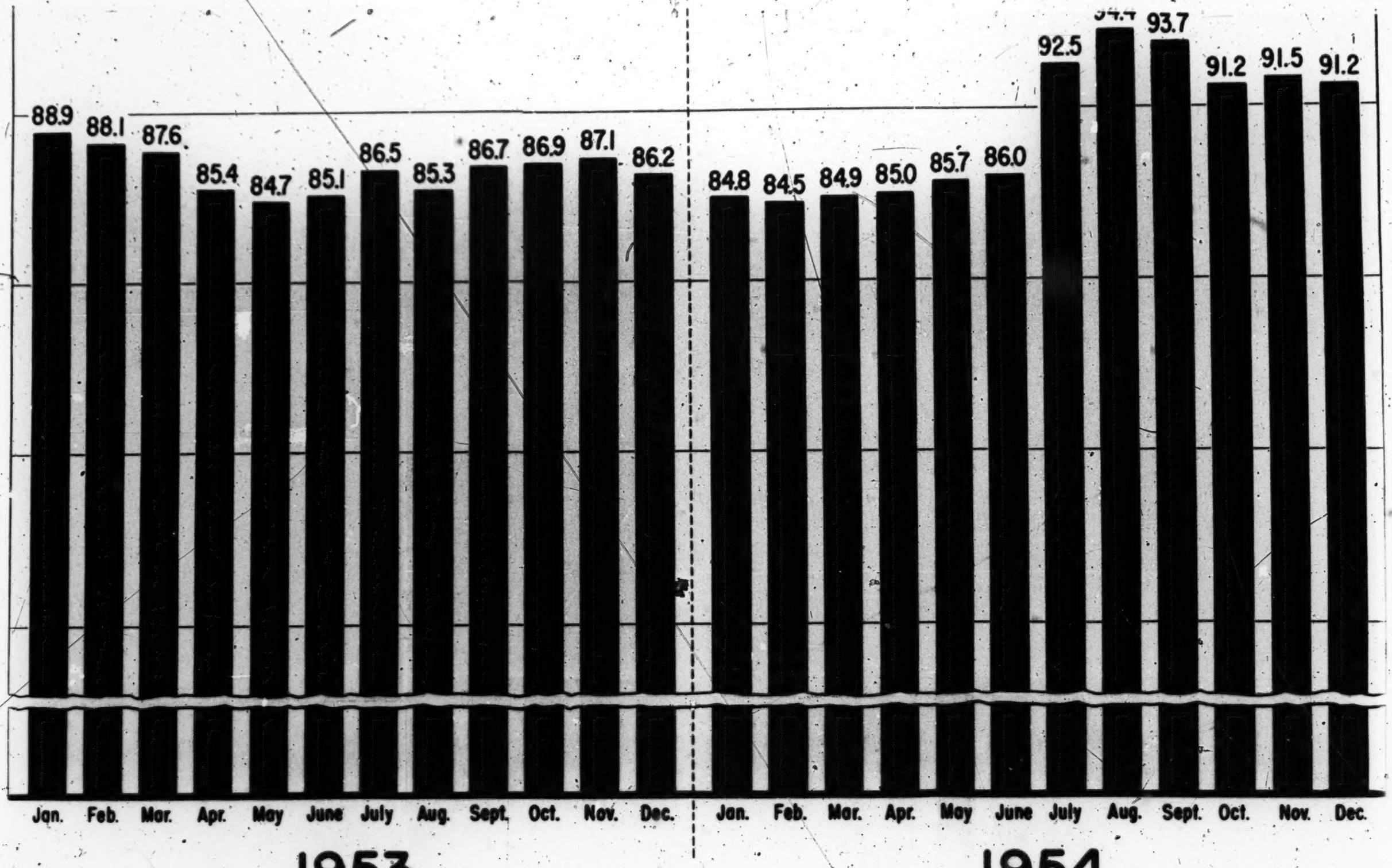
PLAINTIFF'S EXHIBIT 93



[fol. 1749] PLAINTIFF'S EXHIBIT 95

EFENDANT'S PERCENT OF TOTAL PURCHASES BY DEALERS IN THE WASHINGTON METROPOLITAN AREA OF MILK FOR RESALE AS FLUID MILK, 1953-1954




88.9
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85.4
84.7
85.1
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85.7
86.0
92.5
93.7
91.2
91.5
91.2
Jan. Feb. Mar. Apr. May June July Aug. Sept. Oct. Nov. Dec.
Jan. Feb. Mar. Apr. May June July Aug. Sept. Oct. Nov. Dec.
1953
1954

PLAINTIFF'S EXHIBIT 96

QUANTITIES OF D.C. LICENSED MILK REQUIRED BY DEALERS WITH D.C. HEALTH DEPARTMENT PERMITS OR LICENSES FOR RESALE AS FLUID MILK, 1953 - 1957
(All Non-Percentage Figures in Thousands of Pounds)

Dairies	D.C. LICENSED 1953	1954	1955	1956	1957	NON-D.C. LICENSED 1953	1954	1955	1956	1957
Embassy	43,785	48,740	56,336	54,178	59,927	6,568	6,435	-	-	-
Lucerne	74,986	75,977	75,141	75,559	78,619	-	-	-	-	-
Thompson's	91,061	90,211	92,602	97,806	99,868	-	-	-	-	-
Chesthut Farms	243,500	246,183	262,618	269,479	259,239	-	-	-	-	-
Wakefield	25,254	27,622	34,430	43,067	44,802	-	-	-	-	-
Martin's	4,108	4,330	4,710	4,718	5,440	-	-	-	-	-
Richfield	10,767	12,918	12,410	-	-	-	-	-	-	-
High's	6,646	7,230	15,196	27,665	41,412	-	-	-	-	-
Alexandria	-	-	-	-	-	-	-	-	-	-
Golden Rule	-	-	-	-	-	40,547	43,055	47,129	45,920	50,987
Hadley	-	-	-	-	-	3,738	4,581	5,286	6,472	8,010
Sunrise	-	-	-	-	-	-	725	964	1,357	1,269
Harvey	-	-	-	-	-	-	-	937	2,764	5,516
TOTAL (D.C. Licensed)	500,107	513,211	553,443	572,472	589,307	(Non-D.C. Licensed) 67,473	71,531	77,859	84,436	96,601
Total requirements of all dealers located in the Washington Metropolitan area of milk for resale as Fluid Milk.	567,580	584,742	631,302	656,908	685,908					
% D.C. Licensed of Total Requirements	88.1	87.8	87.7	87.1	85.9	11.9	12.2	12.3	12.9	14.1

SOURCE: Table A, C, E, G, I, Stipulation 11.

PURCHASES BY ALL DAIRIES LOCATED IN THE WASHINGTON METROPOLITAN AREA OF MILK FOR RESALE AS FLUID MILK, 1953

(All Non-Percentage Figures in Thousands of Pounds
All Percentage Figures Relate to Grand Total)

GRAND TOTAL

	From Assoc.	%	From Others	%	Total	%
January	43,078	88.9	5,387	11.1	48,465	100.0
February	39,080	88.1	5,280	11.9	44,360	100.0
March	43,082	87.6	6,119	12.4	49,201	100.0
April	40,157	85.4	6,889	14.6	47,046	100.0
May	39,982	84.7	7,274	15.3	47,256	100.0
June	38,974	85.1	6,798	14.9	45,772	100.0
July	40,831	86.5	6,407	13.5	47,238	100.0
August	39,870	85.3	6,736	14.7	46,006	100.0
September	42,107	86.7	6,483	13.3	48,590	100.0
October	43,494	86.9	6,571	13.1	50,065	100.0
November	40,863	87.1	6,025	12.9	46,888	100.0
December	40,236	86.2	6,457	13.8	46,693	100.0
TOTAL	491,154	86.5	76,426	13.5	567,580	100.0

Chestnut Farms

	From Assoc.	%	From Others	%	Total	%
January	20,282	41.8	563	1.2	20,845	43.0
February	18,439	41.6	529	1.2	18,968	42.8
March	20,177	41.0	501	1.0	20,678	42.0
April	19,067	40.5	446	0.9	19,513	41.4
May	19,027	40.3	437	0.9	19,464	41.2
June	19,158	41.9	418	0.9	19,580	42.8
July	21,084	44.5	481	1.0	21,505	45.5
August	20,399	44.3	443	1.0	20,842	45.3
September	21,408	44.1	327	0.7	21,735	44.8
October	21,483	42.9	284	0.6	21,767	43.5
November	20,130	42.9	86	0.2	20,216	43.1
December	18,387	39.4	-	-	18,387	39.4
TOTAL	238,985	42.1	4,515	0.8	243,500	42.9

Thompson's

	From Assoc.	%	From Others	%	Total	%
January	7,748	16.0	103	0.2	7,851	16.2
February	7,282	16.4	89	0.2	7,371	16.6
March	8,075	16.4	99	0.2	8,174	16.6
April	7,589	16.0	98	0.2	7,687	16.2
May	7,956	16.8	98	0.2	8,054	17.0
June	7,191	15.7	94	0.2	7,285	15.9
July	6,737	14.3	111	0.2	6,848	14.5
August	6,584	14.3	118	0.3	6,702	14.6
September	7,419	15.2	122	0.2	7,541	15.4
October	7,948	15.9	141	0.2	8,089	16.1
November	7,553	16.1	131	0.3	7,684	16.4
December	7,664	16.4	151	0.3	7,815	16.7
TOTAL	89,706	15.8	1,355	0.2	91,061	16.0

Lacerte

	From Assoc.	%	From Others	%	Total	%	From Assoc.	%
January	6,096	12.6	-	-	6,096	12.6	1,495	3.1
February	5,548	12.5	-	-	5,548	12.5	1,087	2.3
March	6,443	13.1	-	-	6,443	13.1	869	1.8
April	6,398	13.6	-	-	6,398	13.6	421	0.9
May	5,994	12.7	-	-	5,994	12.7	326	0.7
June	6,199	13.5	-	-	6,199	13.5	273	0.6
July	6,410	13.6	-	-	6,410	13.6	226	0.5
August	6,803	13.5	-	-	6,803	13.5	226	0.5
September	6,847	12.9	-	-	6,847	12.9	232	0.5
October	6,198	12.4	-	-	6,198	12.4	265	0.5
November	5,840	12.5	-	-	5,840	12.5	267	0.6
December	7,488	16.9	-	-	7,488	15.9	114	0.2
TOTAL	74,986	13.2	-	-	74,986	13.2	5,741	1.0

Rebeary

	%	From Others	%	Total	%
January	3.1	2,735	5.6	4,830	8.7
February	2.3	2,782	6.1	3,756	8.4
March	1.8	3,301	6.7	4,170	8.5
April	0.9	4,051	8.6	4,478	9.5
May	0.7	4,157	8.8	4,483	9.5
June	0.6	4,067	8.9	4,340	9.5
July	0.5	3,883	8.1	4,049	8.6
August	0.5	3,940	8.6	4,166	9.1
September	0.5	3,884	8.0	4,116	8.5
October	0.5	3,955	7.9	4,220	8.4
November	0.6	3,790	8.1	4,057	8.7
December	0.2	4,180	9.0	4,894	9.2
TOTAL	1.0	44,612	7.9	50,353	8.9

Alexandria

	From Assoc.	%	From Others	%	Total	%
January	3,378	7.4	-	-	3,378	7.4
February	3,295	7.3	-	-	3,295	7.3
March	3,671	7.5	-	-	3,671	7.5
April	3,333	7.1	-	-	3,333	7.1
May	3,397	7.2	-	-	3,397	7.2
June	3,088	6.5	-	-	3,088	6.5
July	3,151	6.7	-	-	3,151	6.7
August	3,050	6.6	-	-	3,050	6.6
September	3,482	7.0	-	-	3,482	7.0
October	3,850	7.7	-	-	3,850	7.7
November	3,571	7.6	-	-	3,571	7.6
December	3,861	7.0	-	-	3,861	7.0
TOTAL	40,547	7.1	-	-	40,547	7.1

Wakefield

	From Assoc.	%	From Others	%	Total	%
January	813	1.7	1,432	3.0	2,245	4.7
February	613	1.4	1,405	3.2	2,018	4.6
March	636	1.3	1,668	3.4	2,304	4.7
April	369	0.8	1,772	3.8	2,141	4.6
May	138	0.3	2,041	4.3	2,179	4.6
June	894	0.6	1,725	3.8	2,019	4.4
July	507	1.3	1,444	3.0	2,051	4.3
August	294	0.6	1,662	3.6	1,956	4.2
September	414	0.9	1,583	3.2	1,997	4.1
October	608	1.2	1,609	3.2	2,217	4.4
November	671	1.4	1,420	3.0	2,091	4.4
December	499	1.1	1,537	3.3	2,036	4.4
TOTAL	5,956	1.1	19,298	3.4	25,254	4.5

Harvey

	From Assoc.	%	From Others	%	Total	%
January	1,463	3.0	-	-	1,463	3.0
February	1,377	3.1	-	-	1,377	3.1
March	1,489	3.0	-	-	1,489	3.0
April	1,478	3.1	-	-	1,478	3.1
May	1,506	3.2	-	-	1,506	3.2
June	1,865	2.8	-	-	1,865	2.8
July	1,272	2.7	-	-	1,272	2.7
August	1,212	2.6	-	-	1,212	2.6
September	1,446	3.0	-	-	1,446	3.0
October	1,496	3.0	-	-	1,496	3.0
November	1,313	2.8	-	-	1,313	2.8
December	1,303	2.8	-	-	1,303	2.8
TOTAL	16,620	2.9	-	-	16,620	2.9

Richfield

	From Assoc.	%	From Others	%	Total	%
January	956	2.0	-	-	956	2.0
February	954	2.2	-	-	954	2.2
March	1,067	2.2	-	-	1,067	2.2
April	922	2.1	-	-	922	2.1
May	976	2.1	-	-	976	2.1
June	1,014	2.2	-	-	1,014	2.2
July	781	1.6	-	-	781	1.6
August	719	1.6	-	-	719	1.6
September	826	1.7	-	-	826	1.7
October	902	1.8	-	-	902	1.8
November	817	1.7	-	-	817	1.7
December	833	1.8	-	-	833	1.8
TOTAL	10,767	1.9	-	-	10,767	1.9

High's

	From Assoc.	%	From Others	%	Total	%	From Assoc.	%
January	-	-	554	1.1	554	1.1	348	0.7
February	-	-	588	1.2	588	1.2	322	0.7
March	-	-	550	1.1	550	1.1	356	0.7
April	-	-	322	1.1	322	1.1	328	0.7
May	-	-	561	1.1	561	1.1	368	0.8
June	-	-	494	1.1	494	1.1	314	0.7
July	-	-	548	1.2	548	1.2	318	0.7
August	-	-	573	1.2	573	1.2	301	0.7
September	-	-	587	1.2	587	1.2	333	0.7
October	-	-	588	1.2	588	1.2	379	0.8
November	-	-	598	1.3	598	1.3	328	0.7
December	-	-	589	1.2	589	1.2	369	0.8
TOTAL	-	-	6,646	1.2	6,646	1.2	4,108	0.7

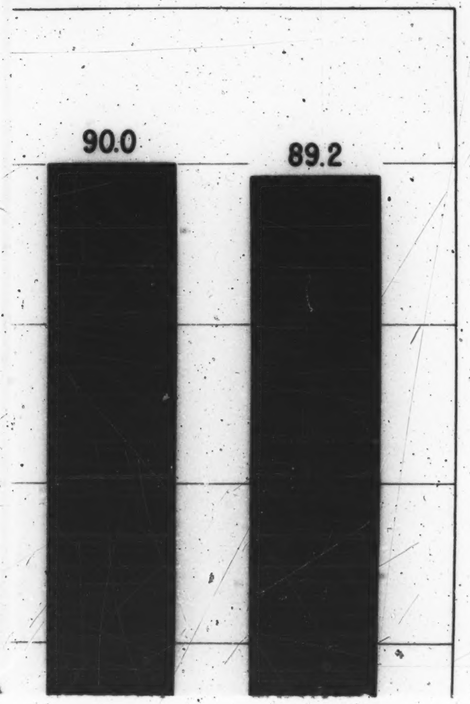
Martin's

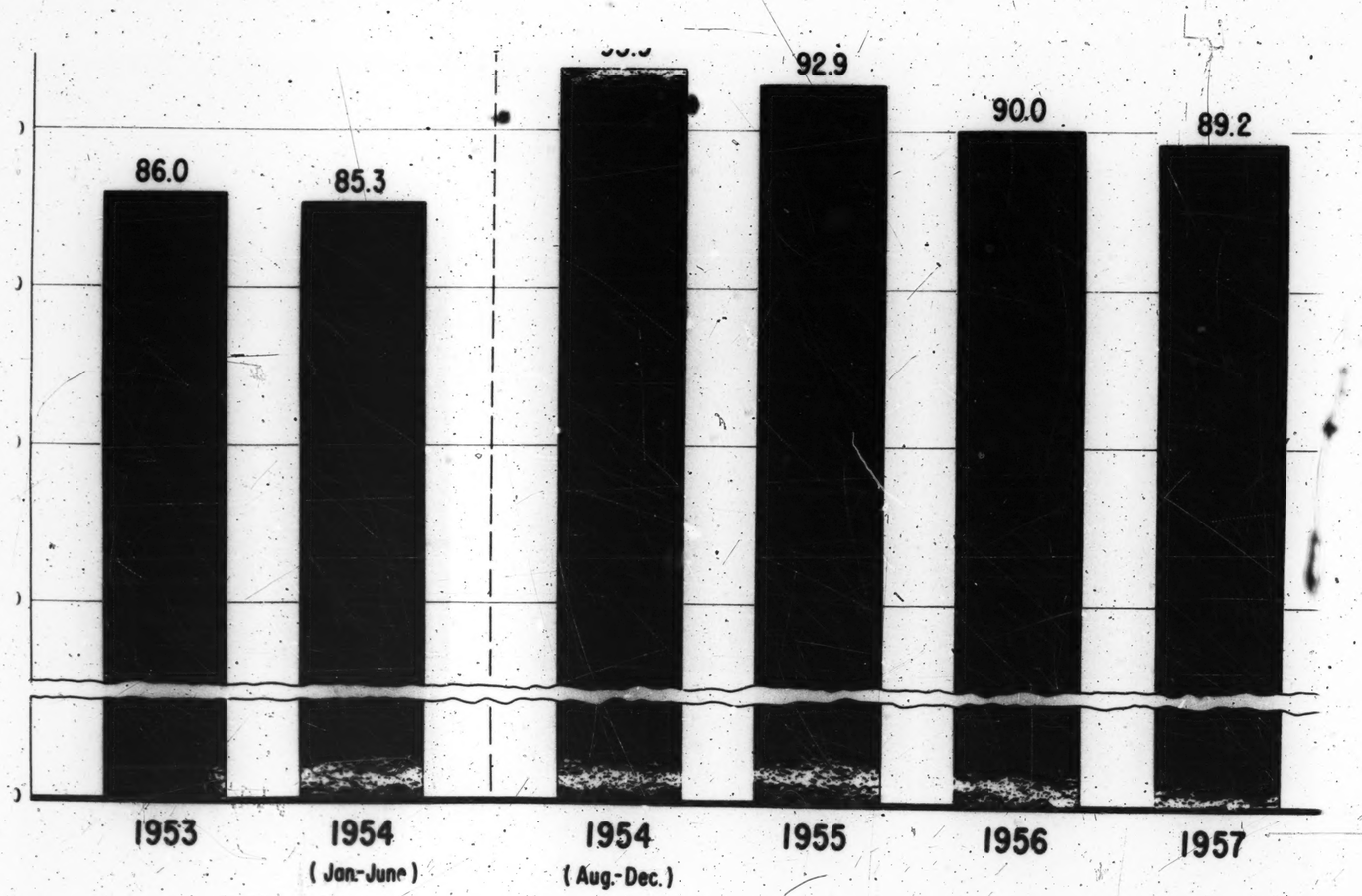
	%	From Others	%	Total	%
January	0.7	-	-	348	0.7
February	0.7	-	-	322	0.7
March	0.7	-	-	356	0.7
April	0.7	-	-	328	0.7
May	0.8	-	-	368	0.8
June	0.7	-	-	314	0.7
July	0.7	-	-	318	0.7
August	0.7	-	-	301	0.7
September	0.7	-	-	333	0.7
October	0.8	-	-	379	0.8
November	0.7	-	-	328	0.7
December	0.8	-	-	369	0.8
TOTAL	0.7	-	-	4,108	0.7

Golden Rule

	From Assoc.	%	From Others	%	Total	%
January	899	0.6	-	-	899	0.6
February	869	0.6	-	-	869	0.6
March	899	0.6	-	-	899	0.6
April	894	0.6	-	-	894	0.6
May	900	0.6	-	-	900	0.6
June	874	0.6	-	-	874	0.6
July	885	0.6	-	-	885	0.6
August	888	0.6	-	-	888	0.6
September	338	0.7	-	-	338	0.7
October	371	0.7	-	-	371	0.7
November	369	0.8	-	-	369	0.8
December	398	0.8	-	-	398	0.8
TOTAL	3,738	0.7	-	-	3,738	0.7

SED MILK REQUIRED FOR
IEALTH DEPARTMENT
957





[fol. 1753]

PERCENTAGE OF ESTIMATED REQUIREMENTS OF FLUID MILK 1/ OF FEDERAL INSTALLATIONS 2/ IN THE WASHINGTON METROPOLITAN AREA AWARDED TO INDIVIDUAL DEALERS, 1953 - JULY 1954
(Based on Quarts) 3/

	Total All Companies	Embassy		Alexandria		Chestnut Farms		Richfield		Harvey	
		Quarts	% of Total	Quarts	% of Total	Quarts	% of Total	Quarts	% of Total	Quarts	% of Total
1953	9,870,483	4,897,904	49.6	1,186,910	12.0	537,602	5.5	1,360,000	13.8	594,910	6.0
1954 Before Acquisition	6,796,780	3,238,528	47.7	756,700	11.1	589,424	8.7	783,910	11.5	27,600	0.4

1/ Based upon estimated requirements of all Fluid Milk excluding Cream and Cottage Cheese.

2/ Fort McNair and U. S. Soldier's Home records not available during first six months of 1953, records having been destroyed according to purchasing and contracting officer. Cameron Station records unavailable during 1953 and 1954.

3/ Estimated requirements stated in other sized containers than quarts have been converted to quarts.

SOURCE: Government Procurement Records.

PLAINTIFF'S EXHIBIT 97

DEFENDANT'S PERCENTAGE OF SALES OF D.C. LICENSED MILK REQUIRED BY DEALERS WITH D.C. HEALTH DEPT. PERMITS OR LICENSES FOR RESALE AS FLUID MILK, 1953 - 1957
(All Non-Percentage Figures in Thousands of Pounds)

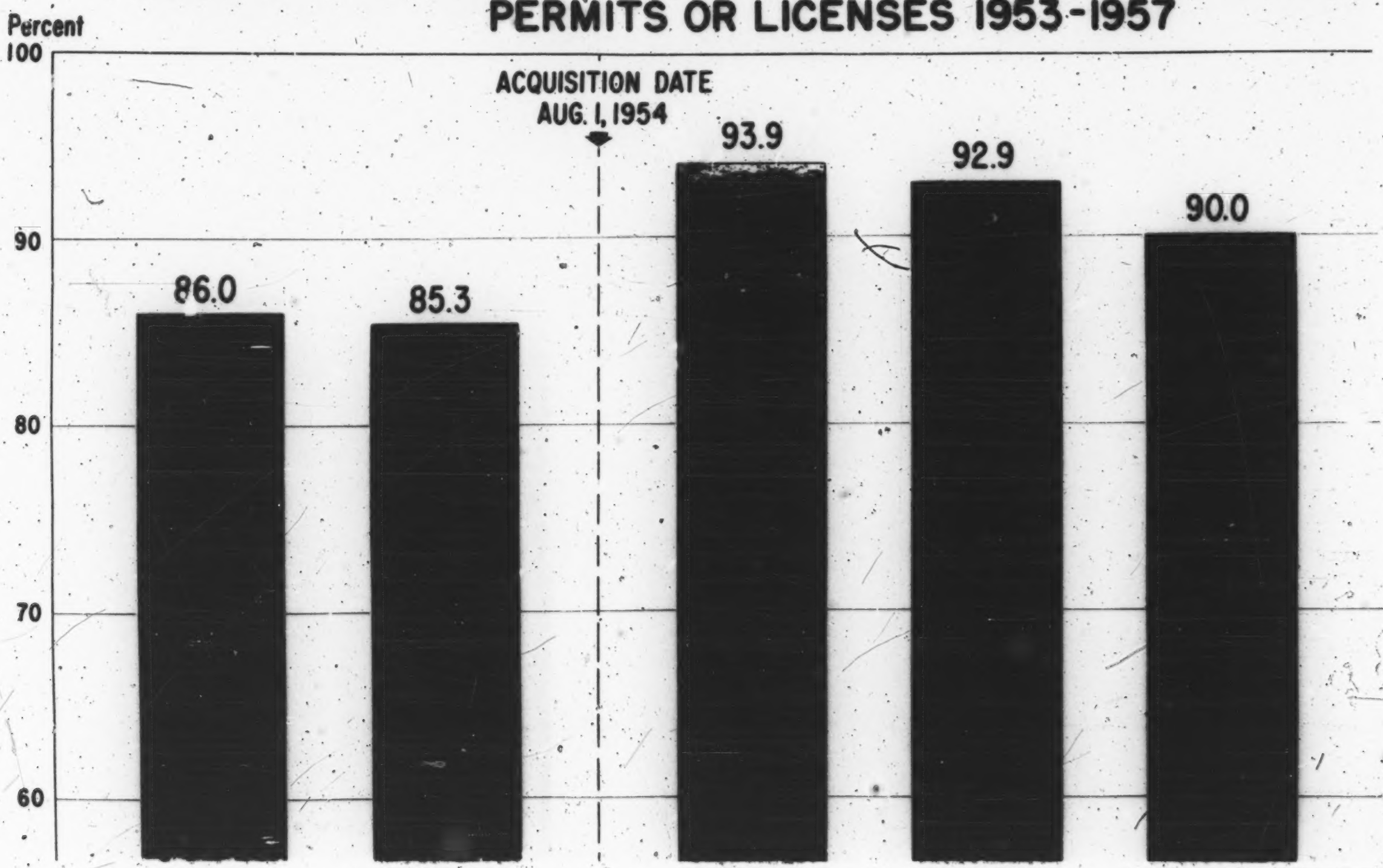
FROM ASSOCIATION

Dairies	1953	1954 Jan-June	1954 Aug.-Dec.	1955	1956	1957
Embassy	5,741	234	22,984	56,336	54,178	59,927
Lucerne	74,986	38,367	31,503	75,141	75,559	78,619
Richfield	10,767	6,398	5,757	12,410	-	-
Chestnut Farms	238,985	119,233	106,391	262,618	269,479	259,239
Thompson's	89,706	44,633	36,641	86,644	82,296	77,379
Wakefield	5,956	2,669	2,840	15,968	29,336	43,788
Martin's	4,108	2,082	1,904	4,517	4,311	5,440
High's	-	-	-	-	-	271
TOTAL (from Assoc)	430,249	213,616	208,020	513,894	515,159	524,663
TOTAL (from Assoc. and from Others.)	500,107	250,306	221,576	553,443	572,472	589,307
% (From Assoc.)	86.0	85.3	93.9	92.9	90.0	89.0

SOURCE: Tables A, C, E, G, I, Stipulation 11.

FROM OTHERS					
	1954				
1953	Jan-June	Aug.-Dec.	1955	1956	1957
38,044	21,437	-	-	-	-
-	-	-	-	-	-
-	-	-	-	-	-
4,515	-	-	-	-	-
1,355	841	1,303	5,958	15,510	22,489
19,298	10,825	9,195	18,462	13,731	1,014
-	-	-	193	407	-
6,646	3,587	3,058	14,936	27,665	41,141
69,858	36,690	13,556	39,549	57,313	64,644
14.0	14.7	6.1	7.1	10.0	11.0

DEFENDANT'S PERCENTAGE OF SALES OF D.C. LICENSED MILK REQ
RESALE AS FLUID MILK BY DEALER WITH D.C. HEALTH DEPAI
PERMITS OR LICENSES 1953-1957

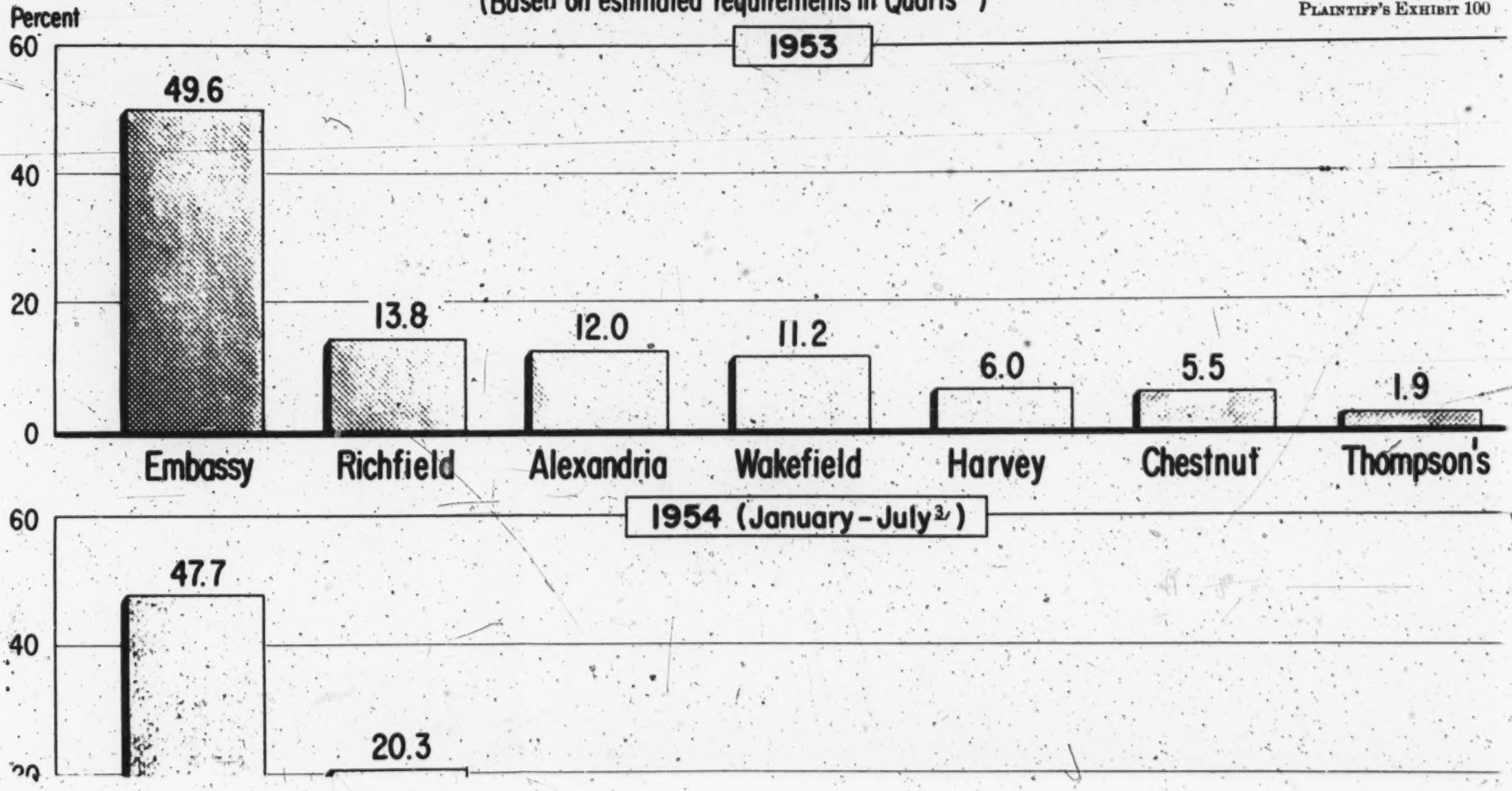


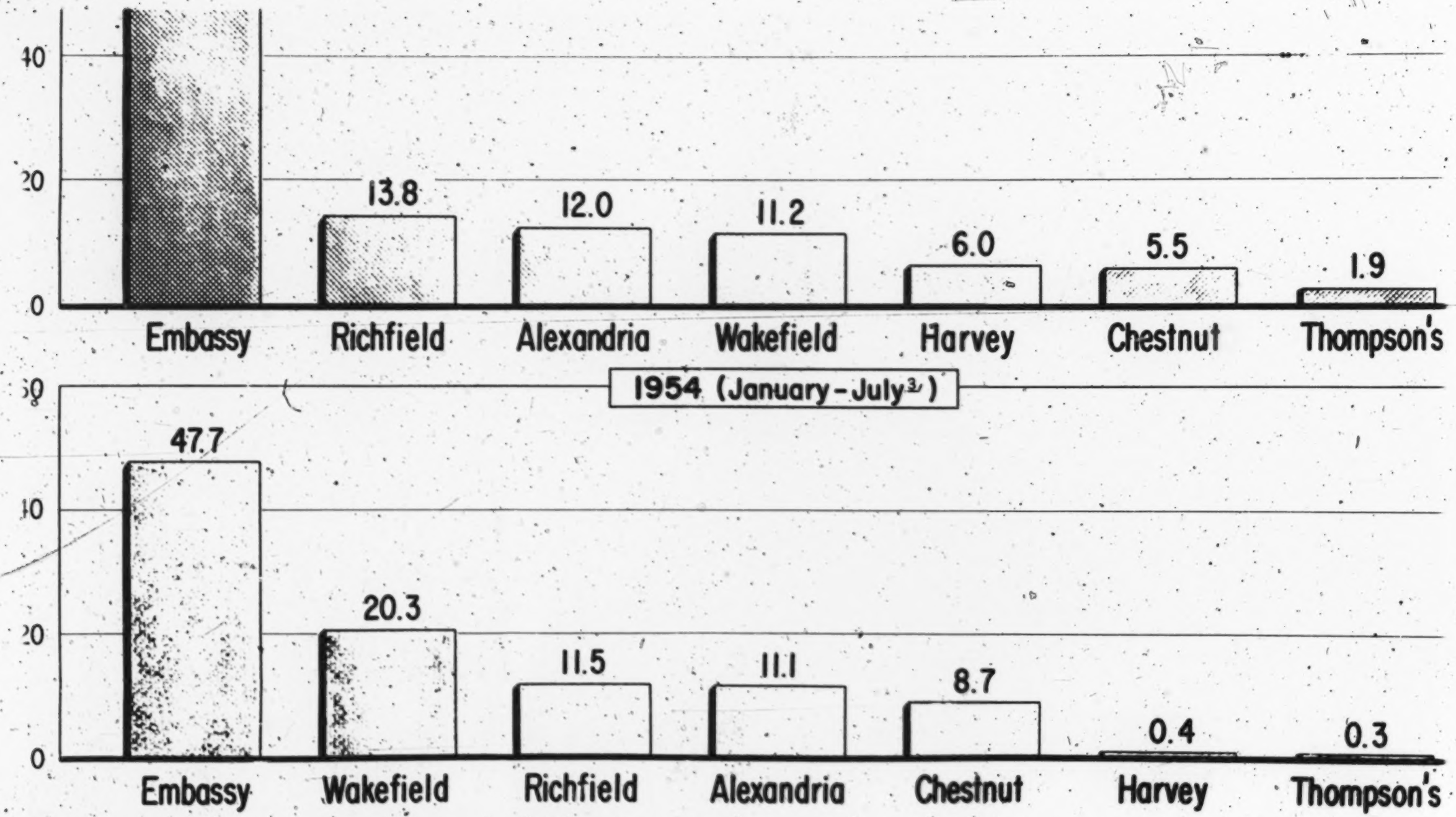
PERCENTAGE OF ESTIMATED REQUIREMENTS OF FLUID MILK OF FEDERAL INSTALLATIONS IN THE WASHINGTON METROPOLITAN AREA AWARDED TO INDIVIDUAL DEALERS, 1953 AND JANUARY - JULY 1954

(Based on estimated requirements in Quarts[2/])

642
[fol. 1754]

PLAINTIFF'S EXHIBIT 100





1/ Based upon estimated requirements of all fluid milk except cream and cottage cheese.

2/ Estimated requirements stated in other sized containers than quarts have been converted to quarts.

3/ Includes all 3rd quarter contracts awarded prior to August 1, 1954.

PERCENTAGE OF MILK SUPPLIED BY DEFENDANT TO DEALERS FOR RESALE AS FLUID MILK TO FEDERAL INSTALLATIONS IN WASHINGTON METROPOLITAN AREA, 1953 - 1957
(Based on Estimated Requirements in Quarts[1] of Fluid Milk, Excluding Cream and Cottage Cheese.)

Installation	Total Requirements (Quarts) (000's omitted)	Association Sales to Contracting Dealers (Quarts) (000's Omitted)	Sales by Others to Contracting Dealers (Quarts)	Association Percentage of Total	Percentage of Total of Others
1953					
Potomac River Naval Command	2,585.3	1,163.2	1,422.1	45.0	55.0
St. Elizabeth's Hospital	1,670.1	321.2	1,348.9	19.2	80.8
Ft. Belvoir	1,637.6	1,232.9	404.7	75.3	24.7
Bolling Air Force Base	1,210.9	138.9	1,072.0	11.5	88.5
Ft. Myer	740.2	735.6	4.6	99.4	.6
Walter Reed Army Medical Center	695.4	427.3	268.1	61.4	38.6
Andrews Air Force Base	585.4	135.5	449.9	23.1	76.9
Freedmen's Hospital	163.0	160.6	2.4	98.5	1.5
U. S. Soldier's Home[2]	155.5	57.2	98.3	36.8	63.2
Fort McNair[2]	104.6	26.2	78.4	25.0	75.0
National Institutes of Health	96.1	59.3	36.8	61.7	38.3
Veterans Administration Hospital	88.4	88.4	-	100.0	-
Navy Radio Station	72.0	72.0	-	100.0	-
National Training School	65.9	49.1	16.8	74.5	25.5
Cameron Station[3]	-	-	-	-	-
TOTALS	9,870.4	4,667.4	5,203.0	47.3	52.7
1954 - January - July					
Potomac River Naval Command	1,360.5	451.0	909.5	33.1	66.9
St. Elizabeth's Hospital	993.3	552.5	440.7	55.6	44.4
Ft. Belvoir	731.1	344.0	387.2	47.0	53.0
Bolling Air Force Base	650.6	265.0	385.6	40.7	59.3
Fort Myer	477.9	249.4	228.5	52.2	47.8
Andrews Air Force Base	427.9	53.0	374.9	12.4	87.6
Walter Reed Army Medical Center	377.9	172.5	205.4	45.6	54.4
U. S. Soldier's Home	182.0	175.6	6.4	96.5	3.5
Ft. McNair	138.8	18.8	120.0	13.5	86.5
Freedmen's Hospital	89.5	86.2	3.3	96.3	3.7
National Institutes of Health	66.2	42.2	24.0	63.7	36.3
Veterans Administration Hospital	58.5	58.5	-	100.0	-
National Training School	40.9	39.4	1.5	96.3	3.7
Navy Radio Station	37.6	24.1	13.5	64.1	35.9
Cameron Station	-	-	-	-	-
TOTALS	5,632.7	2,532.2	3,100.5	45.0	55.0
1954 - August - December					
St. Elizabeth's Hospital	733.3	733.3	-	100.0	-
Ft. Belvoir	685.1	685.1	-	100.0	-
Bolling Air Force Base	482.4	424.5	57.9	88.0	12.0
Potomac River Naval Command	442.8	341.7	101.1	77.2	22.8
Ft. Myer	404.3	311.3	93.0	77.0	23.0
Andrews Air Force Base	397.7	397.7	-	100.0	-
Walter Reed Army Medical Center	314.0	266.9	47.1	85.0	15.0
Fort McNair	145.6	122.9	22.7	84.4	15.6
U. S. Soldiers Home	128.5	128.5	-	100.0	-
Freedmen's Hospital	68.2	68.2	-	100.0	-
National Institutes of Health	62.4	62.4	-	100.0	-
Veterans Administration Hospital	34.4	34.4	-	100.0	-
National Training School	23.2	23.2	-	100.0	-
Navy Radio Station	8.3	3.0	5.3	36.1	63.9
Cameron Station	-	-	-	-	-
TOTALS	3,930.2	3,603.1	327.1	91.7	8.3
1955					

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1955					
Ft. Belvoir	2,458.3	1,951.9	506.4	79.4	20.6
St. Elizabeth's Hospital	1,750.9	1,457.1	293.8	83.2	16.8
Fort Myer	1,637.3	1,500.7	136.6	91.7	8.3
Bolling Air Force Base	1,626.1	1,626.1	-	100.0	-
Potomac River Naval Command	1,427.3	1,268.7	158.6	88.9	11.1
Andrews Air Force Base	1,369.7	853.9	515.8	62.3	37.7
Walter Reed Army Medical Center	1,150.8	691.9	458.9	60.1	39.9
Cameron Station	743.9	743.9	-	100.0	-
Ft. McNair	383.2	383.2	-	100.0	-
U. S. Soldier's Home	304.5	241.4	63.1	79.3	20.7
National Institutes of Health	169.3	149.2	20.1	88.1	11.9
Freedmen's Hospital	130.0	121.7	8.3	93.6	6.4
Veterans Administration Hospital	87.0	74.7	12.3	85.9	14.1
Navy Radio Station	25.0	20.0	5.0	80.0	20.0
National Training School 4/	-	-	-	-	-
TOTALS	13,263.3	11,084.4	2,178.9	83.6	16.4
1956					
Fort Belvoir	2,648.0	2,166.1	481.9	81.8	18.2
Ft. Myer	1,970.8	919.4	1,051.0	46.7	53.3
St. Elizabeth's Hospital	1,722.7	1,581.0	141.7	91.8	8.2
Walter Reed Army Medical Center	1,233.0	288.0	945.0	23.4	76.6
Potomac River Naval Command	1,589.4	1,281.0	308.4	80.6	19.4
Bolling Air Force Base	1,139.2	386.4	752.8	33.9	66.1
Cameron Station	1,513.2	712.2	801.0	47.1	52.9
Andrews and Bolling Air Force Base	833.6	833.6	-	100.0	-
Andrews Air Force Base	804.8	238.5	566.3	29.6	70.4
Fort McNair	416.7	312.8	103.9	75.1	24.9
U. S. Soldier's Home	289.0	152.9	136.1	52.9	47.1
National Institutes of Health	176.4	139.2	37.3	78.9	21.1
Freedmen's Hospital	130.0	120.5	9.5	92.7	7.3
Veterans Administration Hospital	92.9	60.8	32.1	65.4	34.6
Navy Radio Station	46.2	-	46.2	-	100.0
National Training School	-	-	-	-	-
TOTALS	14,605.5	9,192.4	5,413.2	62.9	37.1
1957					
Fort Belvoir	2,785.4	1,339.6	1,445.8	48.1	51.9
Ft. Myer	2,315.4	2,274.9	40.5	98.3	1.7
Potomac River Naval Command	2,014.3	1,016.8	997.5	50.5	49.5
Andrews and Bolling Air Force Base	1,802.3	1,802.3	-	100.0	-
Cameron Station	1,767.0	1,753.5	13.5	99.2	.8
St. Elizabeth's Hospital	1,741.1	1,597.6	143.5	91.8	8.2
Walter Reed Army Medical Center	1,802.4	1,802.4	-	100.0	-
Andrews Air Force Base	1,103.0	-	1,103.0	-	100.0
Bolling Air Force Base	987.6	987.6	-	100.0	-
Fort McNair	468.9	468.9	-	100.0	-
U. S. Soldier's Home	301.6	54.2	247.4	18.0	82.0
National Institutes of Health	161.5	44.8	116.7	27.7	72.3
Freedmen's Hospital 2/	130.4	108.3	22.1	83.1	16.9
Veterans Administration Hospital	101.0	-	101.0	-	100.0
National Radio Station (Cheltenham)	56.8	15.5	41.3	27.3	72.7
National Training School	-	-	-	-	-
TOTALS	16,938.7	12,666.4	4,272.3	74.8	25.2

1/ Estimated requirements stated in other sized containers than quarts have been converted to quarts.
2/ January-June records not available, records having been destroyed according to purchasing and contracting officer.
3/ Cameron Station data included for 1955 and 1956 only as the installation reported that complete records could not be found for prior years.
4/ National Training School for Boys included for 1953 and 1954 only, as no bids were issued after January 1, 1955.
5/ November requirements included with Ft. McNair's data and cannot be segregated.

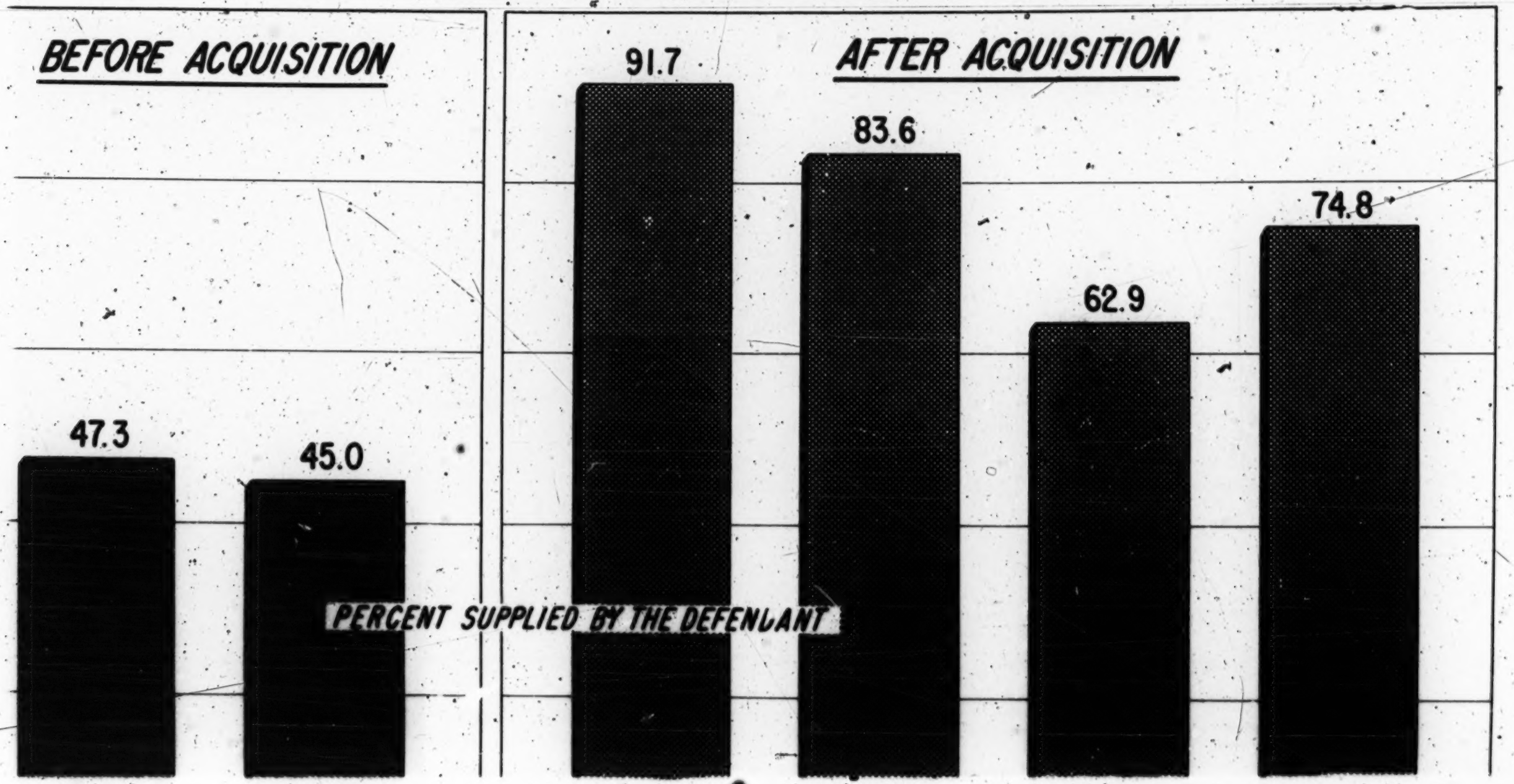
SOURCE: Government Procurement Records.

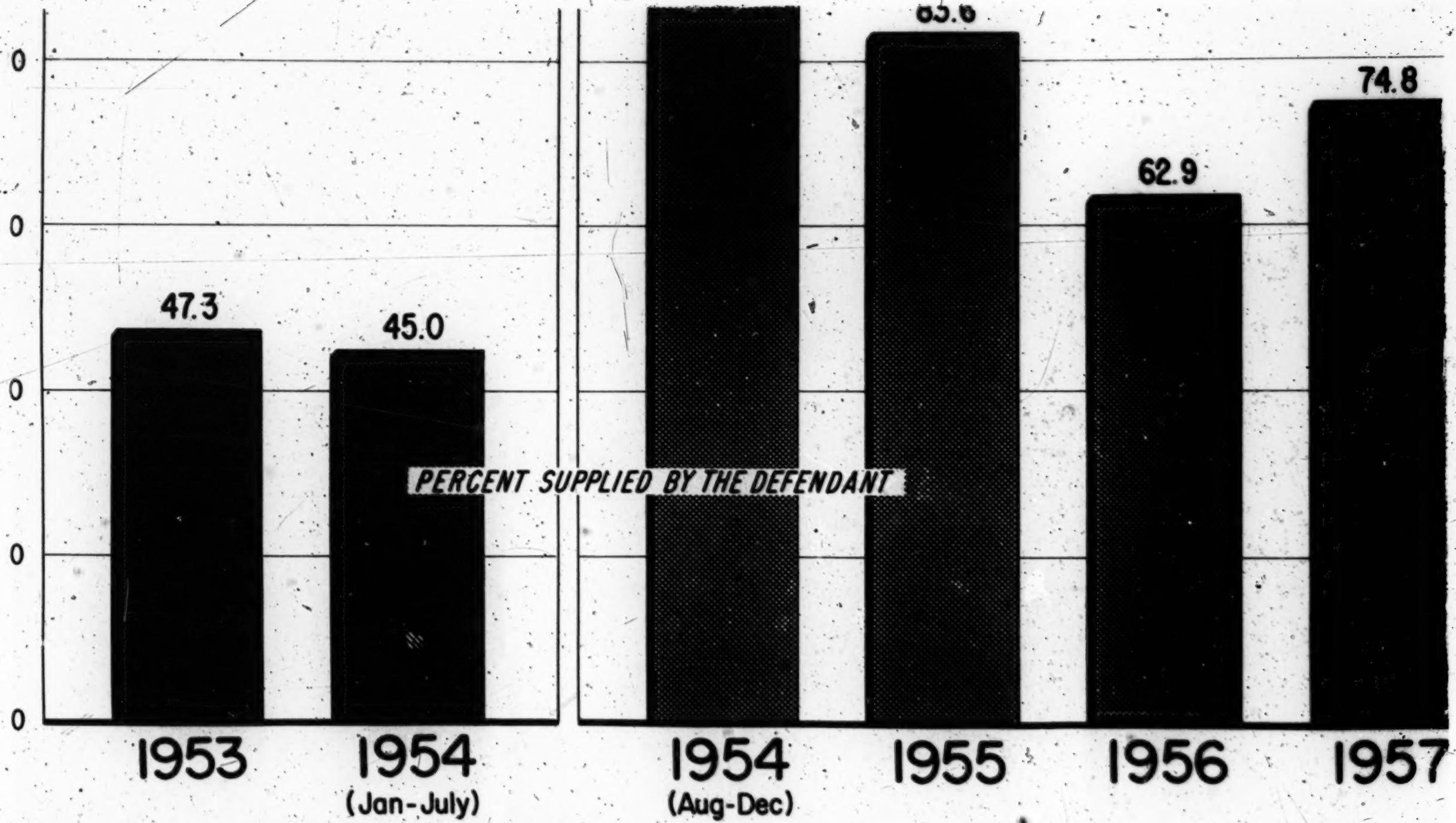
SOURCE OF SUPPLY OF MILK FOR RESALE AS FLUID MILK TO FEDERAL INSTALLATIONS IN THE WASHINGTON METROPOLITAN AREA BEFORE AND AFTER THE ACQUISITION OF EMBASSY, 1953-1957

(Based on estimated requirements in Quarts)[2]

644.
[fol. 1756]

PLAINTIFF'S EXHIBIT 102





Based upon estimated requirements of all fluid milk except cream and cottage cheese.
Estimated requirements stated in other sized containers than quarts have been converted to quarts

PLAINTIFF'S EXHIBIT 99

Thompson's		Wakefield	
Quarts	% of Total	Quarts	% of Tote
187,620	1.9	1,105,537	11.2
23,900	0.3	1,377,118	20.3

[fol. 1757]

PLAINTIFF'S EXHIBIT 103

DOLLAR VALUE OF ESTIMATED REQUIREMENTS OF FLUID MILK[1] OF FEDERAL INSTALLATIONS[2] OF THE WASHINGTON METROPOLITAN AREA

1953	$2,166,015
1954	1,759,370
1955	2,225,999
1956	2,685,130
1957	2,728,747

[1] Based upon estimated requirements of all Fluid Milk excluding cream and cottage cheese.

[2] Fort McNair and U. S. Soldier's Home records not available during first six months of 1953, records having been destroyed. National Training School for Boys included for 1953 and 1954 only, as no bids were issued after January 1, 1955. Cameron Station data included for 1955 and 1956 only as the installation reported that complete records could not be found for prior years.

SOURCE: Government Procurement Records.

[fol. 1758]

PLAINTIFF'S EXHIBIT 104

AVERAGE DAILY SHIPMENTS OF MILK BY MEMBERS OF DEFENDANT AND BY INDEPENDENT EMBASSY PRODUCERS, APRIL 1953-JUNE 1954

	INDEPENDENT PRODUCERS *No. Gallons Per Day Per Shipper*	MEMBERS OF[1] DEFENDANT *No. Gallons Per Day Per Shipper*
1953		
April	119.5	109.5
May	128.8	113.2
June	117.2	102.6
July	102.4	90.9
August	104.4	92.7
September	104.6	95.7
October	99.5	98.2
November	95.3	98.4
December	100.2	102.3
1954		
January	107.0	103.8
February	114.9	106.7
March	114.2	106.2
April	115.6	109.3
May	121.6	111.8
June	102.6	98.7
Weighted Average	109.8	102.7

[1] Average of shipments of milk to all dealers by members of defendant.

SOURCE: Embassy: Plaintiff's Exhibit #73 for identification.
Plaintiff's Exhibit #74 for identification.

Defendant: Defendant's answers to Plaintiff's interrogatories #6a of February 21, 1958 and #2 of September 8, 1958.

EMBASSY DAIRY INC.'S PURCHASES OF MILK FROM THE DEFENDANT AND FROM OTHER SOURCES FOR RESALE AS FLUID MILK, 1953 AND JANUARY - JULY 1954
(All Non-Percentage Figures in Thousands of Pounds)

[fol. 1759]

	Local Independent Producers	Green Spring	Murphy Butter & Egg Co.	Ralph E. Torreyson Co., Inc.	Dairyland Milk & Cream Co.	Total From Other Sources	Total From Association
January	2,735					2,735	1,495
February	2,729					2,729	1,027
March	3,231	71				3,302	869
April	3,423		628			4,051	421
May	3,881	276				4,157	326
June	3,418	649				4,067	273
July	3,112	684		27		3,823	226
August	3,228	685			27	3,940	226
September	3,102	712	70			3,884	232
October	3,103	712	140			3,955	265
November	2,877	703	210			3,790	267
December	3,206	644			329	4,179	114
TOTAL	38,045	5,136	1,049	27	356	44,613	5,742
January	3,393	574			701	4,668	31
February	3,293	439 1/			547	4,279	78
March	3,652	470 1/			630	4,752	42
April	3,699	421 1/			616	4,736	-
May	3,980	345				4,325	-
June	3,420	621 1/			146	4,187	83
July	301	803			121	1,225	3,784
n.-July TOTAL	21,739	3,674			2,761	28,174	4,017

PLAINTIFF'S EXHIBIT 105

Total All Sources	% From Others	% From Association
4,230	64.7	35.3
3,756	72.7	27.3
4,170	79.2	20.8
4,472	90.6	9.4
4,483	92.7	7.3
4,340	93.7	6.3
4,050	94.4	5.6
4,166	94.6	5.4
4,116	94.4	5.6
4,221	93.7	6.3
4,057	93.4	6.6
4,294	97.3	2.7
50,353	88.6	11.4
4,697	99.3	0.7
4,358	98.2	1.8
4,794	99.1	0.9
4,736	100.0	-
4,325	100.0	-
4,270	98.1	1.9
5,008	24.5	75.5
32,190	87.5	12.5

[fol. 1760]

PLAINTIFF'S EXHIBIT 106

PURCHASES BY ALL DAIRIES LOCATED IN THE WASHINGTON METROPOLITAN AREA OF MILK FOR RESALE AS FLUID MILK, 1953-1957
(In Pounds)

1953	567,580,000
1954	584,742,000
1955	631,302,000
1956	656,908,000
1957	685,574,000

SOURCE: Tables A, C, E, G, I, Stipulation 11

[fol. 1761]

PLAINTIFF'S EXHIBIT 107

PERCENTAGE OF ESTIMATED REQUIREMENTS OF FLUID MILK 1/ OF FEDERAL INSTALLATIONS 2/ IN THE WASHINGTON METROPOLITAN AREA AWARDED TO EMBASSY, WAKEFIELD, RICHFIELD, 1953 - 1957.
(Based on Quarts) 3/

	Total All Companies	Embassy		Wakefield		Richfield	
		Quarts	% of Total	Quarts	% of Total	Quarts	% of Total
1953	9,870,483	4,897,904	49.6	1,105,537	11.2	1,360,000	13.8
1954 Before Acquisition	6,796,780	3,238,528	47.7	1,377,118	20.3	783,910	11.5
After Acquisition	2,766,159	991,290	35.9	175,100	6.3	428,180	15.5
1955	13,263,003	5,768,821	43.5	-	-	1,327,433	10.0
1956	14,605,339	4,398,094	30.1	1,381,237	9.5	-	-
1957	16,938,275	5,632,900	33.3	2,197,475	13.0	-	-

1/ Based upon estimated requirements of all Fluid Milk excluding Cream and Cottage Cheese.
2/ Fort McNair and U. S. Soldier's Home records not available during first six months of 1953; records having been destroyed according to purchasing and contracting officer.
National Training School for Boys included for 1953 and 1954 only, as no bids were issued after January 1, 1955.
Cameron Station data included for 1955 and 1956 only as the installation reported that complete records could not be found for prior years.
3/ Estimated requirements stated in other sized containers than quarts have been converted to quarts.

DEFENDANT'S PRICES F.O.B. WASHINGTON, D. C. FOR
MILK SOLD DEALERS FOR RESALE IN WASHINGTON METROPOLITAN AREA
COMPARED TO DEFENDANT'S PRICES F.O.B. WASHINGTON, D. C. FOR MILK SOLD
DEALERS FOR RESALE IN DESIGNATED PRICE AREAS, MAY 1953 - DECEMBER 1956.
CLASS I PRICES (3.5% Butterfat, Not Including Premiums)

	Washington	Frederick - Hagerstown	Eastern Shore and Southern Maryland	Orange, Culpeper, Charlottesville, Luray and Winchester	Beallsville and Damascus
1953					
May	$6.22	$6.17	$5.40	$6.00	$6.17
June	6.22	6.17	5.40	6.00	6.17
July	6.22	6.17	5.40	6.00	6.17
August	6.22	6.17	5.40	6.00	6.17
September	6.22	6.17	5.40	6.00	6.17
October	6.22	6.17	5.40	6.00	6.17
November	6.22	6.17	5.40	6.00	6.17
December	6.22	6.17	5.40	6.00	6.17
1954					
January	6.22	6.17	5.40	6.00	6.17
February	6.22	6.17	5.40	6.00	6.17
March	6.22	6.17 5.80 2/	5.40	6.00	6.17
April	6.22	5.80	5.40	5.54	6.17
May	5.99	5.57	4.94	5.31	5.94
June	5.99	4.88	4.94	5.31	5.94
July	5.99 6.22 1/	4.88	4.94 5.17 1/	5.31	5.94 6.17 1/
August	6.22	4.88	5.17	5.31	6.17
September	6.22	4.88	5.17	5.31	6.17
October	6.22	4.88	5.17	5.31	6.17
November	6.22	4.88	5.17	5.31	6.17
December	6.22	4.88	5.17	5.31	6.17

1955					
January	6.22	4.88	5.17	5.31	6.17
February	6.22	4.88	5.17	5.31	6.17
March	6.22	4.88	5.17	5.31	6.17
April	5.99	4.88	4.99	5.31	5.94
May	5.99	4.88	4.99	5.31	5.94
June	5.99	4.88	4.99	5.31	5.94
July	5.99	4.88	4.99	5.31	5.94
August	5.99	4.88	4.99	5.31	5.94
September	6.22	4.88	4.99	5.31	5.94
October	6.22	4.88	4.99	5.31	5.94
November	6.22	4.88	4.99	5.31	5.94
December	6.22	4.88	4.99	5.31	5.94
1956					
January	6.22	4.88	4.99	5.31	5.94
February	6.22	4.88	4.99	5.31	5.94
March	6.22	4.88	4.99	5.31	5.94
April	5.99	4.88	4.99	5.31	5.94
May	5.99	4.88	4.99	5.31	5.94
June	5.99	4.88	4.99	5.31	5.94
July	6.22	4.88	4.99	5.31	5.94
August	6.22	4.88	4.99	5.31	5.94
September	6.22	4.88	4.99	5.31	5.94
October	6.22	4.88	4.99	5.31	5.94
November	6.22	4.88	4.99	5.31	5.94
December	6.22	4.88	4.99	5.31	5.94

1/ Price change effective July 16.
2/ Price change effective March 15

SOURCE: Defendant's admissions 128, 397, 398, 399, 400.

650
[fol. 1762]
PLAINTIFF'S EXHIBIT 108

PURCHASES BY ALL DAIRIES LOCATED IN THE WASHINGTON METROPOLITAN AREA OF MILK FOR RESALE AS FLUID MILK, 1953
(All Non-Percentage Figures in Thousands of Pounds
All Percentage Figures Relate to Grand Total)

	GRAND TOTAL						Chestnut Farms						Thompson's						Lucerne						
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.
January	43,078	88.9	5,387	11.1	48,465	100.0	20,282	41.8	563	1.2	20,845	43.0	7,748	16.0	103	0.2	7,851	16.2	6,096	12.6	-	-	6,096	12.6	1,495
February	39,080	88.1	5,280	11.9	44,360	100.0	18,439	41.6	529	1.2	18,968	42.8	7,282	16.4	89	0.2	7,371	16.6	5,542	12.5	-	-	5,542	12.5	1,027
March	43,082	87.6	6,119	12.4	49,201	100.0	20,177	41.0	501	1.0	20,678	42.0	8,075	16.4	99	0.2	8,174	16.6	6,443	13.1	-	-	6,443	13.1	869
April	40,157	85.4	6,889	14.6	47,046	100.0	19,067	40.5	446	0.9	19,513	41.4	7,529	16.0	98	0.2	7,627	16.2	6,392	13.6	-	-	6,392	13.6	421
May	39,982	84.7	7,274	15.3	47,256	100.0	19,027	40.3	437	0.9	19,464	41.2	7,956	16.8	98	0.2	8,054	17.0	5,994	12.7	-	-	5,994	12.7	326
June	38,974	85.1	6,798	14.9	45,772	100.0	19,162	41.9	418	0.9	19,580	42.8	7,191	15.7	94	0.2	7,285	15.9	6,199	13.5	-	-	6,199	13.5	273
July	40,831	86.5	6,407	13.5	47,238	100.0	21,024	44.5	481	1.0	21,505	45.5	6,757	14.3	111	0.2	6,868	14.5	6,410	13.6	-	-	6,410	13.6	226
August	39,270	85.3	6,736	14.7	46,006	100.0	20,399	44.3	443	1.0	20,842	45.3	6,584	14.3	118	0.3	6,702	14.6	6,203	13.5	-	-	6,203	13.5	226
September	42,107	86.7	6,483	13.3	48,590	100.0	21,408	44.1	327	0.7	21,735	44.8	7,419	15.2	122	0.2	7,541	15.4	6,247	12.9	-	-	6,247	12.9	232
October	43,494	86.9	6,571	13.1	50,065	100.0	21,483	42.9	284	0.6	21,767	43.5	7,948	15.9	141	0.2	8,089	16.1	6,192	12.4	-	-	6,192	12.4	265
November	40,863	87.1	6,025	12.9	46,888	100.0	20,130	42.9	86	0.2	20,216	43.1	7,553	16.1	131	0.3	7,684	16.4	5,840	12.5	-	-	5,840	12.5	267
December	40,236	86.2	6,457	13.8	46,693	100.0	18,387	39.4	-	-	18,387	39.4	7,664	16.4	151	0.3	7,815	16.7	7,428	15.9	-	-	7,428	15.9	114
TOTAL	491,154	86.5	76,426	13.5	567,580	100.0	238,985	42.1	4,515	0.8	243,500	42.9	89,706	15.8	1,355	0.2	91,061	16.0	74,986	13.2	-	-	74,986	13.2	5,741

	Wakefield						Harvey						Richfield						High's						
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.
January	813	1.7	1,432	3.0	2,245	4.7	1,463	3.0	-	-	1,463	3.0	956	2.0	-	-	956	2.0	-	-	554	1.1	554	1.1	348
February	613	1.4	1,405	3.2	2,018	4.6	1,377	3.1	-	-	1,377	3.1	954	2.2	-	-	954	2.2	-	-	528	1.2	528	1.2	322
March	636	1.3	1,668	3.4	2,304	4.7	1,489	3.0	-	-	1,489	3.0	1,067	2.2	-	-	1,067	2.2	-	-	550	1.1	550	1.1	356
April	369	0.8	1,772	3.8	2,141	4.6	1,478	3.1	-	-	1,478	3.1	922	2.1	-	-	922	2.1	-	-	522	1.1	522	1.1	352
May	138	0.3	2,041	4.3	2,179	4.6	1,506	3.2	-	-	1,506	3.2	976	2.1	-	-	976	2.1	-	-	541	1.1	541	1.1	362
June	294	0.6	1,725	3.8	2,019	4.4	1,265	2.8	-	-	1,265	2.8	1,014	2.2	-	-	1,014	2.2	-	-	494	1.1	494	1.1	314
July	607	1.3	1,444	3.0	2,051	4.3	1,272	2.7	-	-	1,272	2.7	781	1.6	-	-	781	1.6	-	-	548	1.2	548	1.2	318
August	294	0.6	1,662	3.6	1,956	4.2	1,212	2.6	-	-	1,212	2.6	719	1.6	-	-	719	1.6	-	-	573	1.2	573	1.2	301
September	414	0.9	1,583	3.2	1,997	4.1	1,446	3.0	-	-	1,446	3.0	826	1.7	-	-	826	1.7	-	-	567	1.2	567	1.2	355
October	608	1.2	1,609	3.2	2,217	4.4	1,496	3.0	-	-	1,496	3.0	902	1.8	-	-	902	1.8	-	-	582	1.2	582	1.2	379
November	671	1.4	1,420	3.0	2,091	4.4	1,313	2.8	-	-	1,313	2.8	817	1.7	-	-	817	1.7	-	-	598	1.3	598	1.3	332
December	499	1.1	1,537	3.3	2,036	4.4	1,303	2.8	-	-	1,303	2.8	833	1.8	-	-	833	1.8	-	-	589	1.2	589	1.2	369
TOTAL	5,956	1.1	19,298	3.4	25,254	4.5	16,620	2.9	-	-	16,620	2.9	10,767	1.9	-	-	10,767	1.9	-	-	6,646	1.2	6,646	1.2	4,108

[fol. 1776]

PLAINTIFF'S EXHIBIT 120-A

Embassy					Alexandria					
	From Others		Total		From Assoc.		From Others		Total	
%		%		%		%		%		%
3.1	2,735	5.6	4,230	8.7	3,578	7.4	-	-	3,578	7.4
2.3	2,729	6.1	3,756	8.4	3,255	7.3	-	-	3,255	7.3
1.8	3,301	6.7	4,170	8.5	3,671	7.5	-	-	3,671	7.5
0.9	4,051	8.6	4,472	9.5	3,333	7.1	-	-	3,333	7.1
0.7	4,157	8.8	4,483	9.5	3,397	7.2	-	-	3,397	7.2
0.6	4,067	8.9	4,340	9.5	2,988	6.5	-	-	2,988	6.5
0.5	3,823	8.1	4,049	8.6	3,151	6.7	-	-	3,151	6.7
0.5	3,940	8.6	4,166	9.1	3,050	6.6	-	-	3,050	6.6
0.5	3,884	8.0	4,116	8.5	3,422	7.0	-	-	3,422	7.0
0.5	3,955	7.9	4,220	8.4	3,850	7.7	-	-	3,850	7.7
0.6	3,790	8.1	4,057	8.7	3,571	7.6	-	-	3,571	7.6
0.2	4,180	9.0	4,294	9.2	3,281	7.0	-	-	3,281	7.0
1.0	44,612	7.9	50,353	8.9	40,547	7.1	-	-	40,547	7.1

Martin's					Golden Rule					
	From Others		Total		From Assoc.		From Others		Total	
%		%		%		%		%		%
0.7	-	-	348	0.7	299	0.6	-	-	299	0.6
0.7	-	-	322	0.7	269	0.6	-	-	269	0.6
0.7	-	-	356	0.7	299	0.6	-	-	299	0.6
0.7	-	-	352	0.7	294	0.6	-	-	294	0.6
0.8	-	-	362	0.8	300	0.6	-	-	300	0.6
0.7	-	-	314	0.7	274	0.6	-	-	274	0.6
0.7	-	-	318	0.7	285	0.6	-	-	285	0.6
0.7	-	-	301	0.7	282	0.6	-	-	282	0.6
0.7	-	-	355	0.7	338	0.7	-	-	338	0.7
0.8	-	-	379	0.8	371	0.7	-	-	371	0.7
0.7	-	-	332	0.7	369	0.8	-	-	369	0.8
0.8	-	-	369	0.8	358	0.8	-	-	358	0.8
0.7	-	-	4,108	0.7	3,738	0.7	-	-	3,738	0.7

PURCHASES BY ALL DAIRIES LOCATED IN THE WASHINGTON METROPOLITAN AREA OF MILK FOR RESALE AS FLUID MILK, 1953. (Excluding Cream & Cottage Cheese)
(All Non-Percentage Figures in Thousands of Pounds
All Percentage Figures Relate to Grand Total)

	GRAND TOTAL						Chestnut Farms						Thompson's						Lucerne						Embassy				
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	
January	37,077	88.2	4,983	11.8	42,060	100.0	16,761	39.9	563	1.3	17,324	41.2	6,872	16.3	91	0.2	6,963	16.5	5,160	12.3	-	-	5,160	12.3	1,345	3.2	2,461	5.9	
February	33,369	87.3	4,873	12.7	38,242	100.0	15,201	39.8	529	1.4	15,730	41.2	6,354	16.6	78	0.2	6,432	16.8	4,602	12.0	-	-	4,602	12.0	924	2.4	2,457	6.4	
March	36,610	86.7	5,618	13.3	42,228	100.0	16,632	39.4	501	1.2	17,133	40.6	7,003	15.6	86	0.2	7,089	16.8	5,195	12.3	-	-	5,195	12.3	782	1.9	2,971	7.0	
April	33,732	84.3	6,283	15.7	40,015	100.0	15,502	38.7	446	1.1	15,948	39.8	6,586	16.5	86	0.2	6,672	16.7	5,021	12.5	-	-	5,021	12.5	379	1.0	3,646	9.1	
May	33,316	83.5	6,599	16.5	39,915	100.0	15,415	38.6	437	1.1	15,852	39.7	6,797	17.0	84	0.2	6,881	17.2	4,661	11.7	-	-	4,661	11.7	293	0.8	3,741	9.4	
June	31,701	83.7	6,174	16.3	37,875	100.0	14,857	39.2	418	1.1	15,275	40.3	6,127	16.2	80	0.2	6,207	16.4	4,813	12.7	-	-	4,813	12.7	246	0.7	3,660	9.7	
July	35,147	85.7	5,841	14.3	40,988	100.0	17,937	43.8	481	1.2	18,418	45.0	5,890	14.4	97	0.2	5,987	14.6	5,091	12.4	-	-	5,091	12.4	203	0.5	3,441	8.4	
August	33,960	84.7	6,149	15.3	40,109	100.0	17,452	43.5	443	1.1	17,895	44.6	5,711	14.2	102	0.2	5,813	14.4	5,102	12.7	-	-	5,102	12.7	203	0.5	3,546	8.8	
September	36,676	86.2	5,892	13.8	42,568	100.0	18,401	43.2	327	0.8	18,728	44.0	6,483	15.2	107	0.2	6,590	15.4	5,248	12.3	-	-	5,248	12.3	209	0.5	3,496	8.2	
October	37,775	86.3	5,979	13.7	43,754	100.0	18,181	41.5	284	0.7	18,465	42.2	7,013	16.0	124	0.3	7,137	16.3	5,319	12.2	-	-	5,319	12.2	238	0.5	3,539	8.1	
November	35,319	86.6	5,457	13.4	40,776	100.0	17,011	41.7	86	0.2	17,097	41.9	6,573	16.1	114	0.3	6,687	16.4	4,975	12.2	-	-	4,975	12.2	240	0.6	3,411	8.4	
December	33,907	85.4	5,778	14.6	39,685	100.0	14,864	37.5	-	-	14,864	37.5	6,293	16.6	130	0.3	6,423	16.9	6,130	15.9	-	-	6,130	15.9	103	0.3	3,762	9.5	
TOTAL	418,589	85.7	69,626	14.3	488,215	100.0	198,214	40.6	4,515	0.9	202,729	41.5	78,002	16.0	1,179	0.3	79,181	16.3	61,517	12.6	-	-	61,517	12.6	5,165	1.1	40,151	8.2	

	Wakefield						Harvey						Richfield						High's						Golden Rule				
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	
January	762	1.8	1,342	3.2	2,104	5.0	1,390	3.3	-	-	1,390	3.3	815	1.9	-	-	815	1.9	-	-	526	1.2	526	1.2	269	0.6	-	-	
February	570	1.5	1,307	3.4	1,877	4.9	1,308	3.4	-	-	1,308	3.4	798	2.1	-	-	798	2.1	-	-	502	1.3	502	1.3	248	0.7	-	-	
March	586	1.4	1,537	3.7	2,123	5.1	1,415	3.3	-	-	1,415	3.3	970	2.3	-	-	970	2.3	-	-	523	1.2	523	1.2	272	0.6	-	-	
April	335	0.8	1,609	4.0	1,944	4.8	1,404	3.5	-	-	1,404	3.5	885	2.2	-	-	885	2.2	-	-	496	1.3	496	1.3	259	0.7	-	-	
May	123	0.3	1,823	4.5	1,946	4.8	1,431	3.6	-	-	1,431	3.6	843	2.1	-	-	843	2.1	-	-	514	1.3	514	1.3	271	0.7	-	-	
June	264	0.7	1,547	4.1	1,811	4.8	1,202	3.2	-	-	1,202	3.2	892	2.2	-	-	892	2.2	-	-	469	1.2	469	1.2	267	0.7	-	-	
July	547	1.3	1,301	3.2	1,848	4.5	1,208	2.9	-	-	1,208	2.9	769	1.9	-	-	769	1.9	-	-	521	1.3	521	1.3	238	0.6	-	-	
August	268	0.7	1,514	3.8	1,782	4.5	1,151	2.9	-	-	1,151	2.9	691	1.7	-	-	691	1.7	-	-	544	1.4	544	1.4	258	0.7	-	-	
September	372	0.9	1,423	3.3	1,795	4.2	1,374	3.2	-	-	1,374	3.2	753	1.8	-	-	753	1.8	-	-	539	1.3	539	1.3	311	0.7	-	-	
October	591	1.3	1,419	3.3	2,010	4.6	1,421	3.2	-	-	1,421	3.2	773	1.8	-	-	773	1.8	-	-	593	1.3	593	1.3	364	0.8	-	-	
November	604	1.5	1,278	3.1	1,882	4.6	1,247	3.1	-	-	1,247	3.1	635	1.6	-	-	635	1.6	-	-	568	1.4	568	1.4	342	0.8	-	-	
December	411	1.1	1,326	3.4	1,737	4.5	1,238	3.1	-	-	1,238	3.1	636	1.6	-	-	636	1.6	-	-	360	1.4	360	1.4	134	0.8	-	-	
TOTAL	5,413	1.1	17,466	3.6	22,879	4.7	15,789	3.2	-	-	15,789	3.2	9,421	1.9	-	-	9,421	1.9	-	-	6,315	1.3	6,315	1.3	3,413	0.7	-	-	

PLAINTIFF'S EXHIBIT 120-B

			Alexandria					
			From Assoc.		From Others			
$	Total	$		$		$	Total	$
5.9	3,806	9.1	3,389	8.1	-	-	3,389	8.1
6.4	3,381	8.8	3,072	8.0	-	-	3,072	8.0
7.0	3,753	8.9	3,438	8.1	-	-	3,438	8.1
9.1	4,025	10.1	3,049	7.6	-	-	3,049	7.6
9.4	4,034	10.2	3,160	7.9	-	-	3,160	7.9
9.7	3,906	10.4	2,809	7.4	-	-	2,809	7.4
8.4	3,644	8.9	2,951	7.2	-	-	2,951	7.2
8.8	3,749	9.3	2,863	7.1	-	-	2,863	7.1
8.2	3,705	8.7	3,209	7.6	-	-	3,209	7.6
8.1	3,797	8.6	3,586	8.2	-	-	3,586	8.2
8.4	3,651	9.0	3 388	8.3	-	-	3,388	8.3
9.3	3,852	9.8	3,038	7.7	-	-	3,038	7.7
8.2	37,316	9.3	37,982	7.8	-	-	37,982	7.8

Rule			Merrin					
			From Assoc.		From Others			
$	Total	$		$		$	Total	$
-	269	0.6	314	0.8	-	-	314	0.8
-	248	0.7	292	0.8	-	-	292	0.8
-	272	0.6	317	0.8	-	-	317	0.8
-	259	0.7	312	0.8	-	-	312	0.8
-	271	0.7	322	0.8	-	-	322	0.8
-	247	0.7	284	0.7	-	-	284	0.7
-	258	0.6	283	0.7	-	-	283	0.7
-	258	0.7	361	0.7	-	-	361	0.7
-	311	0.7	335	0.8	-	-	335	0.8
-	344	0.8	349	0.8	-	-	349	0.8
-	342	0.8	303	0.7	-	-	303	0.7
-	334	0.8	320	0.8	-	-	320	0.8
-	3,413	0.7	3,673	0.7	-	-	3,673	0.7

PURCHASES BY ALL DAIRIES LOCATED IN THE WASHINGTON METROPOLITAN AREA OF MILK FOR RESALE AS FLUID MILK, 1954
(All Non-Percentage Figures in Thousands of Pounds
All Percentage Figures Relate to Grand Total)

GRAND TOTAL						Chestnut						Thompson's						Lacerne						
From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.
39,614	84.8	7,142	15.2	46,757	100.0	18,060	38.6	-	-	18,060	38.6	7,622	16.3	156	0.3	7,779	16.6	7,469	16.0	-	-	7,469	16.0	31
36,406	84.3	6,661	15.3	43,067	100.0	17,379	40.8	-	-	17,379	40.8	6,993	16.2	136	0.3	7,129	16.5	5,674	13.2	-	-	5,674	13.2	78
41,638	84.9	7,406	15.1	49,044	100.0	20,011	40.8	-	-	20,011	40.8	7,879	16.1	142	0.3	8,021	16.4	6,719	13.7	-	-	6,719	13.7	42
41,961	85.0	7,405	15.0	49,366	100.0	21,019	42.7	-	-	21,019	42.7	7,401	15.0	127	0.3	7,528	15.3	6,416	13.0	-	-	6,416	13.0	-
43,447	85.7	7,251	14.3	50,699	100.0	21,847	43.1	-	-	21,847	43.1	7,787	15.4	150	0.3	7,936	15.7	6,016	11.9	-	-	6,016	11.9	-
41,191	86.0	6,682	14.0	47,873	100.0	20,717	43.3	-	-	20,717	43.3	6,951	14.5	130	0.3	7,081	14.8	6,073	12.7	-	-	6,073	12.7	83
43,730	92.5	3,545	7.5	47,275	100.0	20,358	43.5	-	-	20,358	43.5	6,672	14.1	120	0.3	6,791	14.4	6,105	12.9	-	-	6,105	12.9	3,784
44,475	94.4	2,665	5.6	47,140	100.0	20,011	42.5	-	-	20,011	42.5	6,592	14.0	183	0.4	6,775	14.4	6,209	13.2	-	-	6,209	13.2	5,089
46,032	93.7	3,084	6.3	49,116	100.0	20,546	41.9	-	-	20,546	41.9	7,478	15.2	223	0.5	7,701	15.7	6,161	12.5	-	-	6,161	12.5	4,638
48,118	91.2	4,640	8.8	52,758	100.0	22,568	42.8	-	-	22,568	42.8	7,733	14.7	275	0.5	8,008	15.2	6,513	12.3	-	-	6,513	12.3	4,377
45,986	91.5	4,280	8.5	50,205	100.0	21,304	42.5	-	-	21,304	42.5	7,336	14.6	287	0.6	7,624	15.2	6,281	12.5	-	-	6,281	12.5	4,400
46,931	91.2	4,512	8.8	51,444	100.0	21,962	42.7	-	-	21,962	42.7	7,202	14.6	335	0.6	7,837	15.2	6,339	12.3	-	-	6,339	12.3	4,480
519,470	88.8	65,272	11.2	584,742	100.0	246,183	42.1	-	-	246,183	42.1	87,947	15.0	2,264	0.4	90,211	15.4	75,977	13.0	-	-	75,977	13.0	27,001

Wakefield						Harvey						Richfield						High's						
From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.
239	0.5	1,662	3.5	1,901	4.0	1,346	2.9	-	-	1,346	2.9	931	2.0	-	-	931	2.0	-	-	614	1.3	614	1.3	333
154	0.4	1,668	3.9	1,822	4.3	1,227	2.8	-	-	1,227	2.8	862	2.0	-	-	862	2.0	-	-	532	1.2	532	1.2	323
413	0.8	1,866	3.8	2,279	4.6	1,433	2.9	-	-	1,433	2.9	903	1.8	-	-	903	1.8	-	-	586	1.2	586	1.2	369
583	1.2	1,872	3.8	2,456	5.0	1,326	2.7	-	-	1,326	2.7	888	1.8	-	-	888	1.8	-	-	607	1.2	607	1.2	360
444	0.9	2,055	4.1	2,499	5.0	1,336	2.7	-	-	1,336	2.7	1,550	3.1	-	-	1,550	3.1	-	-	653	1.3	653	1.3	358
836	1.7	1,702	3.6	2,538	5.3	1,167	2.4	-	-	1,167	2.4	1,264	2.6	-	-	1,264	2.6	-	-	595	1.2	595	1.2	339
541	1.1	1,553	3.3	2,094	4.4	1,145	2.4	-	-	1,145	2.4	763	1.6	-	-	763	1.6	-	-	586	1.2	586	1.2	343
381	0.8	1,746	3.7	2,126	4.5	1,152	2.4	-	-	1,152	2.4	848	1.8	-	-	848	1.8	-	-	673	1.4	673	1.4	344
316	0.6	1,882	3.8	2,198	4.4	1,298	2.7	275	0.6	1,573	3.3	1,090	2.2	-	-	1,090	2.2	-	-	650	1.3	650	1.3	394
865	1.6	1,865	3.6	2,730	5.2	-	-	1,763	3.3	1,763	3.3	1,326	2.5	-	-	1,326	2.5	-	-	680	1.3	680	1.3	409
610	1.2	1,772	3.5	2,382	4.7	-	-	1,630	3.2	1,630	3.2	1,213	2.4	-	-	1,213	2.4	-	-	513	1.0	513	1.0	388
668	1.3	1,930	3.8	2,598	5.1	-	-	1,639	3.2	1,639	3.2	1,280	2.5	-	-	1,280	2.5	-	-	542	1.1	542	1.1	369
6,049	1.0	21,573	3.7	27,622	4.7	11,429	2.0	5,306	.9	16,735	2.9	12,918	2.2	-	-	12,918	2.2	-	-	7,230	1.3	7,230	1.3	4,330

	Hadley					
	From Assoc.	$	From Others	$	Total	$
January	-	-	42	0.1	42	0.1
February	-	-	46	0.1	46	0.1
March	-	-	59	0.1	59	0.1
April	-	-	62	0.1	62	0.1
May	-	-	69	0.1	69	0.1
June	-	-	68	0.1	68	0.1
July	-	-	61	0.1	61	0.1
August	-	-	63	0.1	63	0.1
September	-	-	54	0.1	54	0.1
October	-	-	58	0.1	58	0.1
November	-	-	77	0.2	77	0.2
December	-	-	67	0.1	67	0.1
TOTAL	-	-	725	0.1	725	0.1

Rahway					Alexandria					
$	From Others	$	Total	$	From Assoc.	$	From Others	$	Total	$
0.1	4,668	10.0	4,699	10.1	3,221	6.9	-	-	3,221	6.9
0.2	4,280	10.0	4,358	10.2	3,157	7.3	-	-	3,157	7.3
0.1	4,752	9.7	4,794	9.8	3,471	7.1	-	-	3,471	7.1
-	4,736	9.6	4,736	9.6	3,589	7.3	-	-	3,589	7.3
-	4,325	8.5	4,325	8.5	3,722	7.3	-	-	3,722	7.3
0.2	4,187	8.8	4,270	9.0	3,421	7.2	-	-	3,421	7.2
8.0	1,225	2.6	5,008	10.6	3,491	7.4	-	-	3,491	7.4
10.8	-	-	5,089	10.8	3,487	7.4	-	-	3,487	7.4
9.4	-	-	4,638	9.4	3,708	7.6	-	-	3,708	7.6
8.3	-	-	4,377	8.3	3,894	7.4	-	-	3,894	7.4
8.8	-	-	4,400	8.8	3,976	7.9	-	-	3,976	7.9
8.7	-	-	4,480	8.7	3,922	7.6	-	-	3,922	7.6
4.6	28,173	4.8	55,175	9.4	43,055	7.4	-	-	43,055	7.4

Martin's					Golden Pale					
$	From Others	$	Total	$	From Assoc.	$	From Others	$	Total	$
0.7	-	-	333	0.7	352	0.8	-	-	352	0.8
0.8	-	-	323	0.8	350	0.8	-	-	350	0.8
0.8	-	-	369	0.8	400	0.8	-	-	400	0.8
0.7	-	-	360	0.7	382	0.8	-	-	382	0.8
0.7	-	-	358	0.7	388	0.8	-	-	388	0.8
0.7	-	-	339	0.7	341	0.7	-	-	341	0.7
0.7	-	-	343	0.7	329	0.8	-	-	329	0.8
0.7	-	-	344	0.7	351	0.8	-	-	351	0.8
0.8	-	-	394	0.8	401	0.8	-	-	401	0.8
0.8	-	-	409	0.8	432	0.8	-	-	432	0.8
0.8	-	-	388	0.8	417	0.8	-	-	417	0.8
0.7	-	-	369	0.7	409	0.8	-	-	409	0.8
0.7	-	-	4,330	0.7	4,581	0.8	-	-	4,581	0.8

PURCHASES BY ALL DAIRIES LOCATED IN THE WASHINGTON METROPOLITAN AREA OF MILK FOR RESALE AS FLUID MILK, 1954 (Excluding Cream & Cottage Cheese)
(All Non-Percentage Figures in Thousands of Pounds
All Percentage Figures Relate to Grand Total)

	GRAND TOTAL						Chestnut Farms						Thompson's						Lacerne						Kenney					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
ry	34,469	84.2	6,446	15.8	40,915	100.0	14,954	36.6	-	-	14,954	36.6	6,877	16.8	141	0.4	7,018	17.2	6,603	16.1	-	-	6,603	16.1	27	0.1	4,201	10.3	4,229	
ary	31,306	83.9	6,022	16.1	37,328	100.0	14,592	39.1	-	-	14,592	39.1	6,125	16.4	119	0.3	6,244	16.7	4,822	12.9	-	-	4,822	12.9	70	0.2	3,852	10.3	3,922	
	35,629	84.3	6,657	15.7	42,286	100.0	16,645	39.4	-	-	16,645	39.4	6,842	16.2	124	0.3	6,965	16.5	5,636	13.3	-	-	5,636	13.3	38	0.1	4,277	10.1	4,315	
	36,333	84.4	6,670	15.6	43,003	100.0	17,814	41.4	-	-	17,814	41.4	6,582	15.3	113	0.3	6,695	15.6	5,353	12.5	-	-	5,353	12.5	-	-	4,263	9.9	4,263	
	36,678	84.9	6,519	15.1	43,198	100.0	17,593	40.7	-	-	17,593	40.7	6,697	15.5	129	0.3	6,826	15.8	5,143	11.9	-	-	5,143	11.9	-	-	3,893	9.0	3,893	
	35,770	85.8	5,941	14.2	41,711	100.0	17,763	42.6	-	-	17,763	42.6	6,043	14.5	113	0.3	6,156	14.8	5,107	12.2	-	-	5,107	12.2	75	0.2	3,768	9.0	3,843	
	38,024	92.4	3,110	7.6	41,134	100.0	17,661	42.9	-	-	17,661	42.9	5,782	14.1	104	0.3	5,886	14.4	5,094	12.4	-	-	5,094	12.4	3,405	8.3	1,102	2.7	4,507	
t	39,008	94.3	2,328	5.7	41,337	100.0	17,269	41.8	-	-	17,269	41.8	5,729	13.9	159	0.4	5,887	14.3	5,383	13.0	-	-	5,383	13.0	4,580	11.1	-	-	4,580	
mber	40,697	93.8	2,686	6.2	43,383	100.0	17,844	41.1	-	-	17,844	41.1	6,647	15.3	198	0.5	6,845	15.8	5,382	12.3	-	-	5,382	12.3	4,174	9.6	-	-	4,174	
er	42,594	91.3	4,083	8.7	46,677	100.0	19,809	42.4	-	-	19,809	42.4	6,919	14.8	246	0.5	7,164	15.3	5,671	12.2	-	-	5,671	12.2	3,939	8.4	-	-	3,939	
ber	40,150	91.5	3,726	8.5	43,876	100.0	18,406	41.9	-	-	18,406	41.9	6,468	14.8	253	0.6	6,721	15.4	5,364	12.2	-	-	5,364	12.2	3,960	9.0	-	-	3,960	
ber	40,773	91.2	3,871	8.8	44,644	100.0	18,799	41.9	-	-	18,799	41.9	6,670	14.9	288	0.7	6,958	15.6	5,375	12.0	-	-	5,375	12.0	4,032	9.0	-	-	4,032	
AL	451,431	88.5	58,061	11.5	509,491	100.0	209,058	41.0	-	-	209,058	41.0	77,379	15.2	1,986	0.4	79,376	15.6	64,884	12.7	-	-	64,884	12.7	24,301	4.8	25,356	5.0	19,657	

	Wakefield						Harvey						Richfield						High's						Golden Rule					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
ry	213	0.5	1,480	3.6	1,692	4.1	1,279	3.1	-	-	1,279	3.1	874	2.1	-	-	874	2.1	-	-	583	1.4	583	1.4	344	0.9	-	-	344	
ary	139	0.4	1,501	4.0	1,640	4.4	1,165	3.1	-	-	1,165	3.1	830	2.2	-	-	830	2.2	-	-	595	1.4	595	1.4	333	0.9	-	-	333	
	363	0.9	1,642	3.9	2,005	4.8	1,361	3.2	-	-	1,361	3.2	864	2.0	-	-	864	2.0	-	-	537	1.3	537	1.3	373	0.9	-	-	373	
	516	1.2	1,656	3.9	2,172	5.1	1,260	2.9	-	-	1,260	2.9	851	2.0	-	-	851	2.0	-	-	577	1.4	577	1.4	361	0.8	-	-	361	
	391	0.9	1,810	4.2	2,202	5.1	1,269	2.9	-	-	1,269	2.9	1,432	3.3	-	-	1,432	3.3	-	-	680	1.4	680	1.4	366	0.9	-	-	366	
	701	1.7	1,429	3.4	2,130	5.1	1,109	2.7	-	-	1,109	2.7	1,166	2.8	-	-	1,166	2.8	-	-	565	1.4	565	1.4	384	0.8	-	-	384	
	448	1.1	1,288	3.1	1,736	4.2	1,087	2.6	-	-	1,087	2.6	671	1.6	-	-	671	1.6	-	-	556	1.4	556	1.4	310	0.8	-	-	310	
t	320	0.8	1,468	3.5	1,788	4.3	1,095	2.6	-	-	1,095	2.6	745	1.8	-	-	745	1.8	-	-	660	1.6	660	1.6	336	0.8	-	-	336	
mber	262	0.6	1,556	3.6	1,818	4.2	1,233	2.9	261	0.6	1,494	3.5	991	2.3	-	-	991	2.3	-	-	618	1.4	618	1.4	386	0.9	-	-	386	
er	678	1.5	1,461	3.1	2,138	4.6	-	-	1,675	3.6	1,675	3.6	1,204	2.6	-	-	1,204	2.6	-	-	646	1.4	646	1.4	400	0.9	-	-	400	
ber	468	1.1	1,361	3.1	1,830	4.2	-	-	1,548	3.5	1,548	3.5	1,087	2.5	-	-	1,087	2.5	-	-	487	1.1	487	1.1	382	0.8	-	-	382	
ber	497	1.1	1,536	3.2	1,934	4.3	-	-	1,557	3.5	1,557	3.5	1,148	2.6	-	-	1,148	2.6	-	-	515	1.2	515	1.2	375	0.8	-	-	375	
AL	4,996	1.0	18,088	3.6	23,085	4.6	10,858	2.1	5,041	1.0	15,899	3.1	11,865	2.3	-	-	11,865	2.3	-	-	6,868	1.4	6,868	1.4	4,290	0.8	-	-	4,290	

	Bailey					
	From Assoc.	%	From Others	%	Total	%
January	-	-	41	0.1	41	0.1
February	-	-	45	0.1	45	0.1
March	-	-	58	0.1	58	0.1
April	-	-	61	0.1	61	0.1
May	-	-	67	0.2	67	0.2
June	-	-	66	0.1	66	0.1
July	-	-	60	0.1	60	0.1
August	-	-	62	0.2	62	0.2
September	-	-	53	0.1	53	0.1
October	-	-	56	0.1	56	0.1
November	-	-	76	0.2	76	0.2
December	-	-	66	0.2	66	0.2
TOTAL	-	-	711	0.1	711	0.1

Plaintiff's Exhibit 120-D

Alexandria

$	From Assoc.	$	From Others	$	Total	$
10.4	2,995	7.3	-	-	2,995	7.3
10.5	2,942	7.9	-	-	2,942	7.9
10.2	3,178	7.5	-	-	3,178	7.5
9.9	3,279	7.6	-	-	3,279	7.6
9.0	3,463	8.0	-	-	3,463	8.0
9.2	3,174	7.6	-	-	3,174	7.6
11.0	3,859	7.9	-	-	3,259	7.9
11.1	3,238	7.8	-	-	3,238	7.8
9.6	3,481	8.0	-	-	3,481	8.0
8.4	3,602	7.7	-	-	3,602	7.7
9.0	3,658	8.3	-	-	3,658	8.3
9.0	3,630	8.1	-	-	3,630	8.1
9.8	39,899	7.8	-	-	39,899	7.8

Martins

$	From Assoc.	$	From Others	$	Total	$
0.9	303	0.7	-	-	303	0.7
0.9	288	0.8	-	-	288	0.8
0.9	331	0.8	-	-	331	0.8
0.8	318	0.7	-	-	318	0.7
0.9	324	0.8	-	-	324	0.8
0.8	307	0.7	-	-	307	0.7
0.8	306	0.7	-	-	306	0.7
0.8	304	0.7	-	-	304	0.7
0.9	357	0.8	-	-	357	0.8
0.9	372	0.8	-	-	372	0.8
0.9	356	0.8	-	-	356	0.8
0.8	336	0.8	-	-	336	0.8
0.8	3,901	0.8	-	-	3,901	0.8

PURCHASES BY ALL DAIRIES LOCATED IN THE WASHINGTON METROPOLITAN AREA OF MILK FOR RESALE AS FLUID MILK, 1955
(All Non-Percentage Figures in Thousands of Pounds
All Percentage Figures Relate to Grand Total)

[fol. 1780]

	GRAND TOTAL						Chestnut Farms						Thompson's						Lucerne						Embassy		
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others
anuary	47,428	90.2	5,147	9.8	52,575	100.0	22,223	42.3	-	-	22,223	42.3	7,239	13.8	357	0.7	7,596	14.5	6,351	12.1	-	-	6,351	12.1	4,453	8.5	-
ebruary	43,265	90.1	4,834	9.9	48,099	100.0	20,752	43.2	-	-	20,752	43.2	6,834	14.2	367	0.8	7,201	15.0	5,487	11.4	-	-	5,487	11.4	3,763	7.8	-
arch	48,893	89.7	5,769	10.3	54,662	100.0	22,821	41.8	-	-	22,821	41.8	7,645	14.0	436	0.8	8,081	14.8	6,498	11.9	-	-	6,498	11.9	5,002	9.2	-
pril	46,763	89.1	5,789	10.9	52,552	100.0	22,063	42.0	-	-	22,063	42.0	7,295	13.9	441	0.8	7,736	14.7	6,141	11.7	-	-	6,141	11.7	4,907	9.3	-
ay	47,361	89.5	5,688	10.5	52,989	100.0	21,952	41.5	-	-	21,952	41.5	7,603	14.4	511	1.0	8,114	15.4	6,296	11.9	-	-	6,296	11.9	5,085	9.6	-
une	46,023	90.5	4,871	9.5	50,894	100.0	21,479	42.2	-	-	21,479	42.2	6,977	13.7	445	0.9	7,422	14.6	6,390	12.6	-	-	6,390	12.6	4,974	9.8	-
uly	45,665	90.1	5,060	9.9	50,725	100.0	21,485	42.4	-	-	21,485	42.4	6,716	13.3	436	0.9	7,152	14.2	6,236	12.3	-	-	6,236	12.3	4,635	9.1	-
ugust	47,215	90.3	5,150	9.7	52,365	100.0	22,037	42.1	-	-	22,037	42.1	6,759	12.9	439	0.8	7,198	13.7	6,469	12.4	-	-	6,469	12.4	4,815	9.2	-
eptember	47,507	89.5	5,601	10.5	53,108	100.0	20,905	39.4	-	-	20,905	39.4	7,516	14.2	505	1.0	8,021	15.2	6,275	11.8	-	-	6,275	11.8	4,896	9.2	-
ctober	49,543	89.8	5,708	10.2	55,251	100.0	22,463	40.6	-	-	22,463	40.6	7,398	13.4	574	1.0	7,972	14.4	6,237	11.3	-	-	6,237	11.3	4,728	8.6	-
ovember	47,109	89.6	5,470	10.4	52,579	100.0	21,814	40.4	-	-	21,814	40.4	7,232	13.8	612	1.2	7,844	15.0	6,107	11.6	-	-	6,107	11.6	4,455	8.5	-
ecember	49,622	89.5	5,881	10.5	55,503	100.0	23,224	41.9	-	-	23,224	41.9	7,430	13.4	835	1.5	8,265	14.9	6,654	12.0	-	-	6,654	12.0	4,623	8.3	-
TOTAL	566,394	89.8	64,908	10.2	631,302	100.0	262,618	41.7	-	-	262,618	41.7	86,644	13.8	5,958	1.0	92,602	14.8	75,141	11.9	-	-	75,141	11.9	56,336	8.9	-

	Wakefield						Harvey						High's						Richfield						Martin's		
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others
anuary	447	0.8	2,009	3.9	2,456	4.7	-	-	2,075	3.9	2,075	3.9	-	-	556	1.1	556	1.1	1,735	3.3	-	-	1,735	3.3	398	0.7	-
ebruary	369	0.8	1,923	3.9	2,292	4.7	-	-	1,917	3.9	1,917	3.9	-	-	495	1.0	495	1.0	1,557	3.3	-	-	1,557	3.3	362	0.8	-
arch	363	0.7	2,249	4.1	2,612	4.8	-	-	2,368	4.2	2,368	4.2	-	-	560	1.0	560	1.0	1,781	3.3	-	-	1,781	3.3	414	0.8	-
pril	343	0.7	2,316	4.3	2,659	5.0	-	-	2,185	4.2	2,185	4.2	-	-	698	1.3	698	1.3	1,457	2.8	-	-	1,457	2.8	404	0.8	-
ay	194	0.4	2,036	3.8	2,230	4.2	-	-	1,964	3.7	1,964	3.7	-	-	977	1.8	977	1.8	1,495	2.8	-	-	1,495	2.8	408	0.8	-
une	605	1.2	1,556	3.1	2,161	4.3	-	-	1,699	3.2	1,699	3.2	-	-	1,089	2.1	1,089	2.1	1,491	2.9	-	-	1,491	2.9	371	0.7	-
uly	852	1.7	1,321	2.6	2,173	4.3	-	-	1,693	3.2	1,693	3.2	205	0.4	1,461	2.9	1,666	3.3	1,435	2.8	-	-	1,435	2.8	354	0.7	5
ugust	1,545	3.0	1,034	2.0	2,579	5.0	-	-	1,540	2.9	1,540	2.9	55	0.1	1,970	3.7	2,025	3.8	1,459	2.8	-	-	1,459	2.8	301	0.6	27
eptember	3,107	5.9	1,226	2.3	4,333	8.2	-	-	1,834	3.5	1,834	3.5	-	-	1,858	3.4	1,858	3.4	-	-	-	-	-	-	386	0.7	37
ctober	2,918	5.3	999	1.8	3,917	7.1	-	-	2,102	3.7	2,102	3.7	-	-	1,808	3.3	1,808	3.3	-	-	-	-	-	-	377	0.7	44
ovember	2,745	5.2	862	1.7	3,607	6.9	-	-	2,082	3.9	2,082	3.9	-	-	1,699	3.2	1,699	3.2	-	-	-	-	-	-	370	0.7	38
ecember	2,480	4.5	931	1.7	3,411	6.2	-	-	2,124	3.7	2,124	3.7	-	-	1,765	3.2	1,765	3.2	-	-	-	-	-	-	378	0.7	42
TOTAL	15,968	2.5	18,462	2.9	34,430	5.4	-	-	23,543	3.6	23,543	3.6	260	*	14,936	2.4	15,196	2.4	12,410	2.0	-	-	12,410	2.0	4,517	0.7	193

	Radley						Sunrise					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
January	-	-	73	0.1	73	0.1	-	-	77	0.1	77	0.1
February	-	-	55	0.1	55	0.1	-	-	77	0.2	77	0.2
March	-	-	79	0.1	79	0.1	-	-	77	0.1	77	0.1
April	-	-	84	0.2	84	0.2	-	-	65	0.1	65	0.1
May	-	-	75	0.1	75	0.1	-	-	65	0.1	65	0.1
June	-	-	57	0.1	57	0.1	-	-	65	0.1	65	0.1
July	-	-	79	0.2	79	0.2	-	-	65	0.1	65	0.1
August	-	-	75	0.1	75	0.1	-	-	65	0.1	65	0.1
September	-	-	76	0.1	76	0.1	-	-	65	0.1	65	0.1
October	-	-	104	0.2	104	0.2	44	0.1	77	0.1	121	0.2
November	-	-	100	0.2	100	0.2	24	*	77	0.1	101	0.1
December	-	-	107	0.2	107	0.2	17	*	77	0.1	94	0.1

PLAINTIFF'S EXHIBIT 120-E

			Alexandria					
			From		From			
%	Total	%	Assoc.	%	Others	%	Total	%
-	4,453	8.5	4,149	7.9	-	-	4,149	7.9
-	3,763	7.8	3,741	7.8	-	-	3,741	7.8
-	5,008	9.2	3,911	7.2	-	-	3,911	7.2
-	4,907	9.3	3,732	7.1	-	-	3,732	7.1
-	5,085	9.6	3,879	7.3	-	-	3,879	7.3
-	4,974	9.8	3,358	6.7	-	-	3,358	6.7
-	4,635	9.1	3,383	6.7	-	-	3,383	6.7
-	4,015	9.2	3,408	6.5	-	-	3,408	6.5
-	4,896	9.2	3,940	7.4	-	-	3,940	7.4
-	4,788	8.6	4,842	8.8	-	-	4,842	8.8
-	4,455	8.5	4,464	8.5	-	-	4,464	8.5
-	4,623	8.3	4,322	7.8	-	-	4,322	7.8
-	56,336	8.9	47,129	7.5	-	-	47,129	7.5

's			Golden Rule					
			From		From			
%	Total	%	Assoc.	%	Others	%	Total	%
-	398	0.7	433	0.8	-	-	433	0.8
-	362	0.8	400	0.8	-	-	400	0.8
-	414	0.8	458	0.8	-	-	458	0.8
-	404	0.8	421	0.8	-	-	421	0.8
-	408	0.8	449	0.8	-	-	449	0.8
-	371	0.7	378	0.7	-	-	378	0.7
-	359	0.7	364	0.7	-	-	364	0.7
0.1	388	0.7	367	0.7	-	-	367	0.7
0.1	423	0.8	482	0.9	-	-	482	0.9
0.1	421	0.8	536	1.0	-	-	536	1.0
0.1	408	0.8	498	0.9	-	-	498	0.9
0.1	414	0.8	500	0.9	-	-	500	0.9
-	4,710	0.7	5,286	0.8	-	-	5,286	0.8

	GRAND TOTAL						Chestnut Farms						Thompson's						Liberma						Bohemy					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
January	42,089	90.3	4,592	9.7	46,681	100.0	19,398	41.6	-	-	19,398	41.6	6,575	14.1	324	.7	6,899	14.8	5,489	11.8	-	-	5,489	11.8	4,183	9.0	-	-	4,183	9.0
February	38,317	90.7	4,263	9.9	42,580	100.0	18,085	42.4	-	-	18,085	42.4	6,022	14.1	323	.8	6,345	14.9	4,980	11.6	-	-	4,980	11.6	3,572	8.4	-	-	3,572	8.4
March	42,924	89.6	5,067	10.4	47,991	100.0	19,747	41.2	-	-	19,747	41.2	6,692	14.0	382	.8	7,074	14.8	5,630	11.7	-	-	5,630	11.7	4,614	9.6	-	-	4,614	9.6
April	41,287	89.1	5,096	10.9	46,383	100.0	19,149	41.3	-	-	19,149	41.3	6,461	13.9	391	.9	6,852	14.8	5,398	11.7	-	-	5,398	11.7	4,571	9.9	-	-	4,571	9.9
May	41,495	89.4	4,977	10.6	46,472	100.0	18,978	40.9	-	-	18,978	40.9	6,544	14.1	440	.9	6,984	15.0	5,433	11.7	-	-	5,433	11.7	4,764	10.3	-	-	4,764	10.3
June	40,052	90.4	4,337	9.6	44,389	100.0	18,610	42.0	-	-	18,610	42.0	5,979	13.5	381	.9	6,360	14.4	5,433	12.3	-	-	5,433	12.3	4,510	10.2	-	-	4,510	10.2
July	39,525	89.9	4,502	10.1	44,027	100.0	18,551	42.2	-	-	18,551	42.2	5,889	13.3	378	.8	6,207	14.1	5,245	11.9	-	-	5,245	11.9	4,100	9.3	-	-	4,100	9.3
August	41,343	89.9	4,721	10.1	46,064	100.0	19,316	42.0	-	-	19,316	42.0	5,834	12.7	379	.8	6,213	13.5	5,600	12.2	-	-	5,600	12.2	4,274	9.3	-	-	4,274	9.3
September	41,595	89.1	5,142	10.9	46,737	100.0	18,151	38.9	-	-	18,151	38.9	6,480	13.9	435	.9	6,915	14.8	5,461	11.7	-	-	5,461	11.7	4,403	9.4	-	-	4,403	9.4
October	44,421	89.6	5,223	10.4	49,644	100.0	19,767	39.8	-	-	19,767	39.8	6,812	13.8	529	1.1	7,341	14.9	5,712	11.5	-	-	5,712	11.5	4,514	9.1	-	-	4,514	9.1
November	42,042	89.4	5,068	10.6	47,110	100.0	18,446	39.2	-	-	18,446	39.2	6,451	13.7	546	1.2	6,997	14.9	5,670	12.1	-	-	5,670	12.1	4,195	8.9	-	-	4,195	8.9
December	42,222	88.8	5,415	11.2	47,637	100.0	19,045	40.1	-	-	19,045	40.1	6,432	13.5	723	1.5	7,155	15.0	5,668	11.9	-	-	5,668	11.9	4,182	8.8	-	-	4,182	8.8
TOTAL	497,312	89.6	58,403	10.4	555,715	100.0	227,183	41.0	-	-	227,183	41.0	76,111	13.7	5,231	.9	81,342	14.6	65,653	11.8	-	-	65,653	11.8	51,882	9.4	-	-	51,882	9.4

	Wakefield						Harvey						High's						Richfield						Golden Rule					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
January	361	.8	1,623	3.4	1,984	4.2	-	-	1,971	4.1	1,971	4.1	-	-	528	1.1	528	1.1	1,465	3.1	-	-	1,465	3.1	397	.8	-	-	397	.8
February	292	.7	1,521	3.5	1,813	4.2	-	-	1,821	4.2	1,821	4.2	-	-	470	1.1	470	1.1	1,338	3.1	-	-	1,338	3.1	367	.9	-	-	367	.9
March	283	.6	1,752	3.6	2,035	4.2	-	-	2,250	4.6	2,250	4.6	-	-	532	1.1	532	1.1	1,540	3.2	-	-	1,540	3.2	417	.9	-	-	417	.9
April	270	.6	1,823	3.9	2,093	4.5	-	-	2,076	4.4	2,076	4.4	-	-	663	1.4	663	1.4	1,208	2.6	-	-	1,208	2.6	384	.8	-	-	384	.8
May	153	.3	1,608	3.5	1,761	3.8	-	-	1,866	3.9	1,866	3.9	-	-	928	2.0	928	2.0	1,263	2.7	-	-	1,263	2.7	408	.9	-	-	408	.9
June	478	1.1	1,229	2.8	1,707	3.9	-	-	1,576	3.4	1,576	3.4	-	-	1,034	2.3	1,034	2.3	1,259	2.8	-	-	1,259	2.8	348	.8	-	-	348	.8
July	635	1.5	985	2.2	1,620	3.7	-	-	1,608	3.6	1,608	3.6	205	.5	1,388	3.2	1,593	3.7	1,202	2.6	-	-	1,202	2.6	327	.7	-	-	327	.7
August	1,267	2.8	848	1.8	2,115	4.6	-	-	1,463	3.1	1,463	3.1	55	.1	1,872	4.1	1,927	4.2	1,227	2.7	-	-	1,227	2.7	334	.7	-	-	334	.7
September	2,617	5.6	1,032	2.2	3,649	7.8	-	-	1,742	3.6	1,742	3.6	-	-	1,765	3.8	1,765	3.8	-	-	-	-	-	-	439	1.0	-	-	439	1.0
October	2,247	4.5	763	1.4	3,010	5.9	-	-	1,997	3.9	1,997	3.9	-	-	1,718	3.5	1,718	3.5	-	-	-	-	-	-	488	1.0	-	-	488	1.0
November	2,306	4.9	724	1.4	3,030	6.3	-	-	1,978	4.1	1,978	4.1	-	-	1,614	3.4	1,614	3.4	-	-	-	-	-	-	467	1.0	-	-	467	1.0
December	2,084	4.4	782	1.5	2,866	5.9	-	-	2,018	4.2	2,018	4.2	-	-	1,677	3.5	1,677	3.5	-	-	-	-	-	-	470	1.0	-	-	470	1.0
TOTAL	12,993	2.3	14,690	2.7	27,683	5.0	-	-	22,366	3.9	22,366	3.9	260	•	14,189	2.6	14,449	2.6	10,502	1.9	-	-	10,502	1.9	4,846	.9	-	-	4,846	.9

	Radley						Sunrise					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
January	-	-	72	.2	72	.2	-	-	74	.2	74	.2
February	-	-	54	.1	54	.1	-	-	74	.2	74	.2
March	-	-	77	.1	77	.1	-	-	74	.2	74	.2
April	-	-	82	.2	82	.2	-	-	61	.1	61	.1
May	-	-	74	.2	74	.2	-	-	61	.1	61	.1
June	-	-	56	.1	56	.1	-	-	61	.1	61	.1
July	-	-	77	.2	77	.2	-	-	61	.1	61	.1
August	-	-	74	.2	74	.2	-	-	61	.1	61	.1
September	-	-	74	.2	74	.2	-	-	61	.1	61	.1
October	-	-	102	.2	102	.2	43	.1	74	.1	117	.2
November	-	-	98	.2	98	.2	23	•	74	.2	97	.2
December	-	-	105	.2	105	.2	17	•	74	.2	91	.2
TOTAL	-	-	945	.2	945	.2	83	•	810	.1	893	.1

PLAINTIFF'S EXHIBIT 120-F

Alexandria

From Assoc.	%	From Others	%	Total	%
3,860	8.3	-	-	3,860	8.3
3,455	8.1	-	-	3,455	8.1
3,621	7.6	-	-	3,621	7.6
3,470	7.5	-	-	3,470	7.5
3,591	7.7	-	-	3,591	7.7
3,109	7.0	-	-	3,109	7.0
3,114	7.1	-	-	3,114	7.1
3,166	6.9	-	-	3,166	6.9
3,698	7.9	-	-	3,698	7.9
4,501	9.1	-	-	4,501	9.1
4,154	8.9	-	-	4,154	8.9
4,011	8.4	-	-	4,011	8.4
43,750	7.9	-	-	43,750	7.9

Martin's

From Assoc.	%	From Others	%	Total	%
361	.8	-	-	361	.8
326	.8	-	-	326	.8
380	.8	-	-	380	.8
376	.8	-	-	376	.8
361	.8	-	-	361	.8
326	.7	-	-	326	.7
317	.7	5	•	322	.7
270	.6	24	•	294	.6
346	.7	33	.1	379	.8
337	.7	40	.1	377	.8
330	.7	34	.1	364	.8
319	.7	36	.1	355	.8
4,049	.7	172	•	4,221	.7

PURCHASES BY ALL DAIRIES LOCATED IN THE WASHINGTON METROPOLITAN AREA OF MILK FOR RESALE AS FLUID MILK, 1956
(All Non-Percentage Figures in Thousands of Pounds
All Percentage Figures Relate to Grand Total)

[fol. 1782]

	GRAND TOTAL						Chestnut Farms						Thompson's						Lucerne							
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%
January	48,920	88.4	6,468	11.6	55,389	100.0	23,191	42.0	-	-	23,191	42.0	7,033	12.7	878	1.6	7,911	14.3	6,219	11.3	-	-	6,219	11.3	4,709	8.5
February	46,305	87.8	6,518	12.2	52,823	100.0	22,352	42.4	-	-	22,352	42.4	6,959	13.2	957	1.8	7,926	15.0	5,794	11.0	-	-	5,794	11.0	4,144	7.9
March	50,145	87.3	7,073	12.2	57,219	100.0	23,204	40.6	-	-	23,204	40.6	7,384	12.9	1,094	1.9	8,478	14.8	6,533	11.4	-	-	6,533	11.4	5,076	8.9
April	45,561	86.4	7,225	13.6	52,785	100.0	21,313	40.3	-	-	21,313	40.3	7,053	13.4	1,186	2.3	8,239	15.7	6,059	11.5	-	-	6,059	11.5	4,532	8.6
May	46,495	85.1	8,172	14.9	54,626	100.0	21,403	39.2	-	-	21,403	39.2	7,702	14.1	1,327	2.4	9,029	16.5	6,077	11.2	-	-	6,077	11.2	4,640	8.5
June	43,932	86.3	7,032	13.7	50,963	100.0	20,126	39.5	-	-	20,126	39.5	6,859	13.5	1,287	2.5	8,146	16.0	6,443	12.7	-	-	6,443	12.7	4,031	7.9
July	44,626	86.4	7,069	13.6	51,695	100.0	20,545	39.7	-	-	20,545	39.7	6,791	13.2	1,410	2.7	8,201	15.9	6,383	12.4	-	-	6,383	12.4	4,637	9.0
August	43,704	89.4	7,599	14.6	51,242	100.0	20,801	40.6	-	-	20,801	40.6	5,717	11.2	1,641	3.2	7,358	14.4	6,466	12.6	-	-	6,466	12.6	4,463	8.7
September	45,960	86.2	7,378	13.8	53,337	100.0	21,062	39.5	-	-	21,062	39.5	6,487	12.2	1,512	2.8	7,999	15.0	6,406	12.0	-	-	6,406	12.0	4,335	8.1
October	52,321	87.3	7,606	12.7	59,928	100.0	26,105	43.5	-	-	26,105	43.5	6,749	11.3	1,402	2.4	8,151	13.7	6,096	10.2	-	-	6,096	10.2	4,465	7.4
November	50,421	87.3	7,309	12.7	57,730	100.0	24,371	42.2	-	-	24,371	42.2	6,916	12.0	1,317	2.3	8,233	14.3	6,386	11.1	-	-	6,386	11.1	4,604	8.0
December	51,465	87.0	7,705	13.0	59,171	100.0	25,006	42.3	-	-	25,006	42.3	6,646	11.2	1,489	2.5	8,135	13.7	6,697	11.3	-	-	6,697	11.3	4,242	7.7
TOTAL	569,815	86.7	87,093	13.3	656,908	100.0	269,479	41.0	-	-	269,479	41.0	82,296	12.5	15,510	2.4	97,806	14.9	75,559	11.5	-	-	75,559	11.5	54,178	8.2

	Wakefield						Harvey						High's						Golden Rule							
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%
January	2,495	4.5	1,085	2.0	3,580	6.5	-	-	2,407	4.2	2,407	4.2	-	-	1,873	3.4	1,873	3.4	515	0.9	-	-	515	0.9	353	0.6
February	2,150	4.1	1,357	2.6	3,507	6.7	-	-	2,333	4.3	2,333	4.3	-	-	1,644	3.1	1,644	3.1	479	0.9	-	-	479	0.9	347	0.6
March	2,604	4.6	1,471	2.6	4,075	7.2	-	-	2,476	4.2	2,476	4.2	-	-	1,822	3.2	1,822	3.2	539	1.0	-	-	539	1.0	403	0.7
April	1,882	3.6	1,716	3.3	3,598	6.9	-	-	2,380	4.4	2,380	4.4	-	-	1,763	3.3	1,763	3.3	466	0.9	-	-	466	0.9	365	0.7
May	1,717	3.1	1,952	3.6	3,669	6.7	-	-	2,501	4.5	2,501	4.5	-	-	2,188	4.0	2,188	4.0	512	0.9	-	-	512	0.9	411	0.8
June	2,137	4.2	1,343	2.6	3,480	6.8	-	-	2,075	4.1	2,075	4.1	-	-	2,144	4.1	2,144	4.1	457	0.9	-	-	457	0.9	355	0.7
July	2,054	4.0	1,068	2.1	3,122	6.1	-	-	2,033	4.0	2,033	4.0	-	-	2,394	4.5	2,394	4.5	421	0.8	-	-	421	0.8	329	0.6
August	2,038	4.0	1,161	2.2	3,199	6.2	-	-	2,040	4.0	2,040	4.0	-	-	2,547	4.9	2,547	4.9	436	0.9	-	-	436	0.9	340	0.7
September	2,614	4.9	570	1.1	3,184	6.0	-	-	2,340	4.4	2,340	4.4	-	-	2,789	5.2	2,789	5.2	651	1.2	-	-	651	1.2	328	0.6
October	3,384	5.6	640	1.1	4,024	6.7	-	-	2,488	4.2	2,488	4.2	-	-	2,856	4.7	2,856	4.7	716	1.2	-	-	716	1.2	345	0.6
November	3,134	5.4	606	1.0	3,740	6.4	-	-	2,476	4.3	2,476	4.3	-	-	2,743	4.7	2,743	4.7	641	1.1	-	-	641	1.1	367	0.6
December	3,127	5.3	762	1.3	3,889	6.6	-	-	2,374	4.0	2,374	4.0	-	-	2,902	4.9	2,902	4.9	639	1.1	-	-	639	1.1	368	0.6
TOTAL	29,336	4.5	13,731	2.1	43,067	6.6	-	-	27,923	4.2	27,923	4.2	-	-	27,665	4.2	27,665	4.2	6,472	1.0	-	-	6,472	1.0	4,311	0.6

	Radley					
	From Assoc.	%	From Others	%	Total	%
January	-	-	104	0.2	104	0.2
February	-	-	98	0.2	98	0.2
March	-	-	88	0.1	88	0.1
April	-	-	72	0.1	72	0.1
May	-	-	96	0.2	96	0.2
June	-	-	82	0.2	82	0.2
July	-	-	66	0.1	66	0.1
August	-	-	49	0.1	49	0.1
September	113	0.2	63	0.1	176	0.3
October	104	0.2	97	0.1	201	0.3
November	84	0.1	90	0.1	174	0.2
December	50	0.1	101	0.2	151	0.1
[illegible]	--	--	[illegible]	0.	--	--

PLAINTIFF'S EXHIBIT 120-G

Rahway				Alexandria					
From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
-	-	4,709	8.9	4,382	7.9	-	-	4,382	7.9
-	-	4,144	7.9	4,072	7.7	-	-	4,072	7.7
-	-	5,076	8.9	4,399	7.7	-	-	4,399	7.7
-	-	4,532	8.6	3,848	7.3	-	-	3,848	7.3
-	-	4,640	8.5	3,928	7.2	-	-	3,928	7.2
-	-	4,031	7.9	3,466	6.8	-	-	3,466	6.8
-	-	4,637	9.0	3,415	6.6	-	-	3,415	6.6
-	-	4,463	8.7	3,397	6.6	-	-	3,397	6.6
-	-	4,335	8.1	3,803	7.2	-	-	3,803	7.2
-	-	4,465	7.4	3,773	6.3	-	-	3,773	6.3
-	-	4,604	8.0	3,463	6.0	-	-	3,463	6.0
-	-	4,542	7.7	3,974	6.7	-	-	3,974	6.7
-	-	54,178	8.2	45,920	7.0	-	-	45,920	7.0

Martin's				Sunrise					
From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
44	0.1	397	0.7	23	•	77	0.1	101	0.1
42	0.1	389	0.7	8	•	77	0.1	85	0.1
45	0.1	448	0.8	3	•	77	0.1	81	0.1
43	0.1	408	0.8	43	0.1	65	0.1	107	0.2
43	0.1	454	0.9	65	0.1	65	0.1	129	0.2
36	0.1	391	0.8	58	0.1	65	0.1	122	0.2
33	0.1	362	0.7	51	0.1	65	0.1	116	0.2
36	0.1	376	0.8	46	0.1	65	0.1	110	0.2
39	0.1	367	0.7	161	0.3	65	0.1	225	0.4
46	0.1	391	0.7	584	1.0	77	0.1	662	1.1
-	-	367	0.6	455	0.8	77	0.1	532	0.9
-	-	368	0.6	416	0.7	77	0.1	494	0.8
407	0.1	4,718	0.7	1,913	0.3	851	0.1	2,764	0.4

PLAINTIFF'S EXHIBIT 120-G

Rahway				Alexandria					
From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
-	-	4,709	8.5	4,382	7.9	-	-	4,382	7.9
-	-	4,144	7.9	4,072	7.7	-	-	4,072	7.7
-	-	5,076	8.9	4,399	7.7	-	-	4,399	7.7
-	-	4,532	8.6	3,848	7.3	-	-	3,848	7.3
-	-	4,640	8.5	3,928	7.2	-	-	3,928	7.2
-	-	4,031	7.9	3,466	6.8	-	-	3,466	6.8
-	-	4,637	9.0	3,415	6.6	-	-	3,415	6.6
-	-	4,463	8.7	3,397	6.6	-	-	3,397	6.6
-	-	4,335	8.1	3,803	7.2	-	-	3,803	7.2
-	-	4,465	7.4	3,773	6.3	-	-	3,773	6.3
-	-	4,604	8.0	3,463	6.0	-	-	3,463	6.0
-	-	4,542	7.7	3,974	6.7	-	-	3,974	6.7
-	-	54,178	8.2	45,920	7.0	-	-	45,920	7.0

Martin's				Sunrise					
From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
44	0.1	397	0.7	23	*	77	0.1	101	0.1
42	0.1	389	0.7	8	*	77	0.1	85	0.1
45	0.1	448	0.8	3	*	77	0.1	81	0.1
43	0.1	408	0.8	43	0.1	65	0.1	107	0.2
43	0.1	454	0.9	65	0.1	65	0.1	129	0.2
36	0.1	391	0.8	58	0.1	65	0.1	122	0.2
33	0.1	362	0.7	51	0.1	65	0.1	116	0.2
36	0.1	376	0.8	46	0.1	65	0.1	110	0.2
39	0.1	367	0.7	161	0.3	65	0.1	229	0.4
46	0.1	391	0.7	584	1.0	77	0.1	662	1.1
-	-	367	0.6	455	0.9	77	0.1	532	0.9
-	-	368	0.6	416	0.7	77	0.1	494	0.8
407	0.1	4,718	0.7	1,913	0.3	851	0.1	2,764	0.4

PURCHASES BY ALL DAIRIES LOCATED IN THE WORKINGTON METROPOLITAN AREA OF MILK FOR RESALE AS LIQUID MILK, 1956. (Excluding Cream & Cottage Cheese)
(All Non-Percentage Figures in Thousands of Pounds
All Percentage Figures Relate to Grand Total)

	GRAND TOTAL						Chestnut Farm						Thompson's						Lowrigg						Bakery			
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%
January	44,388	88.2	5,981	11.8	50,368	100.0	20,538	40.9	-	-	20,538	40.9	6,442	12.8	824	1.6	7,266	14.4	5,831	11.6	-	-	5,831	11.6	4,533	9.0	-	-
February	41,283	87.6	5,906	12.4	47,188	100.0	19,659	41.7	-	-	19,659	41.7	6,206	13.2	862	1.8	7,068	15.0	5,344	11.3	-	-	5,344	11.3	3,833	8.1	-	-
March	44,172	87.5	6,386	12.5	50,558	100.0	20,079	39.8	-	-	20,079	39.8	6,494	12.9	962	1.9	7,456	14.8	5,935	11.8	-	-	5,935	11.8	4,717	9.3	-	-
April	40,290	86.2	6,517	13.8	46,807	100.0	18,480	39.5	-	-	18,480	39.5	6,234	13.3	1,048	2.2	7,282	15.5	5,547	11.9	-	-	5,547	11.9	4,156	8.9	-	-
May	40,360	84.8	7,274	15.2	47,635	100.0	18,445	38.7	-	-	18,445	38.7	6,595	13.9	1,136	2.4	7,731	16.3	5,339	11.3	-	-	5,339	11.3	4,135	8.7	-	-
June	37,605	85.8	6,237	14.2	43,843	100.0	17,271	39.4	-	-	17,271	39.4	5,739	13.1	1,077	2.9	6,816	15.6	5,462	12.5	-	-	5,462	12.5	3,567	8.1	-	-
July	38,589	86.1	6,303	13.9	44,893	100.0	18,007	40.1	-	-	18,007	40.1	5,484	12.3	1,139	2.5	6,623	14.8	5,523	12.3	-	-	5,523	12.3	4,166	9.3	-	-
August	38,510	85.1	6,819	14.9	45,329	100.0	18,328	40.4	-	-	18,328	40.4	5,084	11.1	1,442	3.1	6,466	14.2	5,647	12.5	-	-	5,647	12.5	4,106	9.1	-	-
September	40,893	85.7	6,827	14.3	47,720	100.0	18,610	39.0	-	-	18,610	39.0	5,791	12.1	1,350	2.8	7,141	14.9	5,785	12.0	-	-	5,785	12.0	3,990	8.4	-	-
October	47,401	87.0	7,103	13.0	54,503	100.0	23,414	43.0	-	-	23,414	43.0	6,152	11.3	1,278	2.3	7,430	13.6	5,673	10.4	-	-	5,673	10.4	4,161	7.6	-	-
November	45,135	86.9	6,789	13.1	51,924	100.0	21,576	41.6	-	-	21,576	41.6	6,103	11.8	1,162	2.2	7,265	14.0	5,783	11.1	-	-	5,783	11.1	4,318	8.3	-	-
December	43,797	86.1	7,076	13.9	50,873	100.0	20,778	40.8	-	-	20,778	40.8	5,801	11.4	1,300	2.6	7,101	14.0	5,622	11.0	-	-	5,622	11.0	4,065	8.0	-	-
TOTAL	502,363	86.4	79,238	13.6	581,601	100.0	235,189	40.4	-	-	235,189	40.4	72,065	12.4	13,560	2.3	85,625	14.7	67,493	11.6	-	-	67,493	11.6	49,728	8.6	-	-

	Wakefield						Barrow						High's						Golden Rule						Martin's			
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%
January	2,[illegible]	4.1	893	1.8	2,994	5.9	-	-	2,287	4.5	2,287	4.5	-	-	1,779	3.5	1,779	3.5	484	1.0	-	-	484	1.0	320	0.6	40	0.1
February	1,676	3.6	1,058	2.3	2,734	5.9	-	-	2,216	4.6	2,216	4.6	-	-	1,562	3.2	1,562	3.2	450	1.0	-	-	450	1.0	314	0.7	38	0.1
March	2,017	4.0	1,140	2.2	3,157	6.2	-	-	2,352	4.6	2,352	4.6	-	-	1,731	3.4	1,731	3.4	510	1.0	-	-	510	1.0	361	0.7	41	0.1
April	1,494	3.2	1,363	2.9	2,857	6.1	-	-	2,261	4.8	2,261	4.8	-	-	1,673	3.5	1,673	3.5	433	0.9	-	-	433	0.9	336	0.7	38	0.1
May	1,310	2.7	1,489	3.1	2,799	5.8	-	-	2,376	5.0	2,376	5.0	-	-	2,079	4.3	2,079	4.3	478	1.0	-	-	478	1.0	369	0.8	39	0.1
June	1,589	3.6	999	2.2	2,588	5.8	-	-	1,971	4.5	1,971	4.5	-	-	2,037	4.6	2,037	4.6	421	1.0	-	-	421	1.0	314	0.7	32	0.1
July	1,546	3.5	804	1.8	2,350	5.3	-	-	1,931	4.3	1,931	4.3	-	-	2,274	5.0	2,274	5.0	377	0.8	-	-	377	0.8	298	0.7	29	0.1
August	1,540	3.4	878	1.9	2,418	5.3	-	-	1,938	4.3	1,938	4.3	-	-	2,480	5.3	2,480	5.3	398	0.9	-	-	398	0.9	308	0.7	32	0.1
September	2,048	4.3	446	0.9	2,494	5.2	-	-	2,223	4.7	2,223	4.7	-	-	2,650	5.6	2,650	5.6	598	1.3	-	-	598	1.3	293	0.6	35	0.1
October	2,845	5.2	[illegible]	1.0	3,383	6.2	-	-	2,364	4.3	2,364	4.3	-	-	2,713	5.0	2,713	5.0	673	1.2	-	-	673	1.2	308	0.6	41	0.1
November	2,627	5.1	504	1.0	3,131	6.1	-	-	2,352	4.5	2,352	4.5	-	-	2,606	5.1	2,606	5.1	598	1.1	-	-	598	1.1	332	0.6	-	-
December	2,426	4.8	591	1.2	3,019	6.0	-	-	2,222	4.4	2,222	4.4	-	-	2,727	5.4	2,727	5.4	595	1.2	-	-	595	1.2	288	0.6	-	-
TOTAL	23,179	4.0	10,709	1.8	33,888	5.8	-	-	26,586	4.6	26,586	4.6	-	-	26,283	4.5	26,283	4.5	6,009	1.0	-	-	6,009	1.0	3,853	0.7	365	0.1

	Sunrise					
	From Assoc.	%	From Others	%	Total	%
January	25	*	74	0.1	98	0.1
February	8	*	74	0.2	82	0.2
March	3	*	74	0.1	77	0.1
April	42	0.1	61	0.1	103	0.2
May	63	0.1	61	0.1	125	0.2
June	58	0.1	61	0.1	118	0.2
July	50	0.1	61	0.1	112	0.2
August	45	0.1	61	0.1	106	0.2
September	160	0.3	61	0.1	221	0.4
October	575	1.1	74	0.1	649	1.1
November	437	0.8	74	0.1	511	0.9
December	411	0.8	74	0.1	485	0.9
TOTAL	[illegible]	-	[illegible]	0.1	[illegible]	0.1

PLAINTIFF'S EXHIBIT 120-H

				Alexandria					
				From		From			
	$	Total	$	Assoc.	$	Others	$	Total	$
	-	4,933	9.0	4,098	8.2	-	-	4,098	8.2
	-	3,833	8.1	3,793	8.0	-	-	3,793	8.0
	-	4,717	9.3	4,056	8.0	-	-	4,056	8.0
	-	4,156	8.9	3,578	7.7	-	-	3,578	7.7
	-	4,138	8.7	3,609	7.6	-	-	3,609	7.6
	-	3,567	8.1	3,185	7.3	-	-	3,185	7.3
	-	4,166	9.3	3,144	7.0	-	-	3,144	7.0
	-	4,106	9.1	3,126	6.9	-	-	3,126	6.9
	-	3,990	8.4	3,563	7.5	-	-	3,563	7.5
	-	4,161	7.6	3,495	6.4	-	-	3,495	6.4
	-	4,318	8.3	3,278	6.3	-	-	3,278	6.3
	-	4,049	8.0	3,747	7.4	-	-	3,747	7.4
	-	49,728	8.6	42,671	7.3	-	-	42,671	7.3

				Bailey					
				From		From			
	$	Total	$	Assoc.	$	Others	$	Total	$
	0.1	360	0.7	-	-	102	0.2	102	0.2
	0.1	352	0.8	-	-	96	0.2	96	0.2
	0.1	402	0.8	-	-	86	0.2	86	0.2
	0.1	364	0.8	-	-	71	0.2	71	0.2
	0.1	408	0.9	-	-	94	0.2	94	0.2
	0.1	346	0.8	-	-	80	0.2	80	0.2
	0.1	321	0.8	-	-	65	0.1	65	0.1
	0.1	334	0.8	-	-	48	0.1	48	0.1
	0.1	388	0.7	113	0.2	62	0.1	175	0.3
	0.1	349	0.7	102	0.2	95	0.2	197	0.4
	-	332	0.6	83	0.2	87	0.2	170	0.4
	-	322	0.6	48	0.1	99	0.2	147	0.3
	0.1	4,218	0.8	346	0.1	985	0.2	1,331	0.3

PURCHASES BY ALL DAIRIES LOCATED IN THE WASHINGTON METROPOLITAN AREA OF MILK FOR RESALE AS FLUID MILK, 1957
(All Non-Percentage Figures in Thousands of Pounds
All Percentage Figures Relate to Grand Total)

[fol. 1784]

	GRAND TOTAL						Chestnut Farms						Thompson's					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
January	51,180	85.9	8,413	14.1	59,995	100.0	22,834	38.3	-	-	22,834	38.3	6,725	11.3	1,619	2.7	8,344	14.0
February	45,341	86.5	7,081	13.5	52,422	100.0	19,774	37.8	-	-	19,774	37.8	5,982	11.4	1,593	3.0	7,545	14.4
March	52,511	86.7	8,073	13.3	60,584	100.0	23,069	38.1	-	-	23,069	38.1	6,798	11.2	1,731	2.9	8,529	14.1
April	50,118	85.7	8,337	14.3	58,455	100.0	22,275	38.1	-	-	22,275	38.	6,504	11.1	1,976	3.4	8,480	14.5
May	51,196	85.9	8,485	14.1	59,681	100.0	22,085	36.9	-	-	22,085	36.9	6,811	11.4	2,883	3.8	9,094	15.2
June	47,827	85.8	7,811	14.2	55,098	100.0	21,260	38.6	-	-	21,260	38.6	5,889	10.7	1,963	3.6	7,852	14.3
July	47,443	85.8	7,876	14.2	55,319	100.0	20,764	37.5	-	-	20,764	37.5	5,831	10.5	1,904	3.5	7,735	14.0
August	49,700	86.4	7,801	13.6	57,501	100.0	22,147	38.5	-	-	22,147	38.5	6,413	11.1	1,873	3.3	8,286	14.4
September	48,212	85.6	8,104	14.4	56,316	100.0	19,774	35.1	-	-	19,774	35.1	6,739	12.0	1,873	3.3	8,612	15.3
October	48,632	85.1	8,502	14.9	57,134	100.0	21,106	36.9	-	-	21,106	36.9	6,492	11.4	1,983	3.5	8,475	14.9
November	47,951	85.9	7,894	14.1	55,845	100.0	21,286	38.1	-	-	21,286	38.1	6,550	11.7	1,827	3.3	8,377	15.0
December	49,689	86.0	8,054	14.0	57,683	100.0	22,285	39.7	-	-	22,285	39.7	6,615	11.5	1,844	3.2	8,459	14.7
TOTAL	589,200	85.9	96,373	14.1	685,574	100.0	859,239	37.8	-	-	859,239	37.8	77,379	11.3	22,489	3.3	99,868	14.6

	Locarno						Rokeby					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%		
January	6,476	10.9	-	-	6,476	10.9	5,668	9.5	-	-		
February	5,611	10.7	-	-	5,611	10.7	4,777	9.1	-	-		
March	6,513	10.7	-	-	6,513	10.7	5,347	9.2	-	-		
April	6,186	10.6	-	-	6,186	10.6	5,223	8.9	-	-		
May	6,399	10.7	-	-	6,399	10.7	5,523	9.3	-	-		
June	6,411	11.6	-	-	6,411	11.6	4,629	8.4	-	-		
July	6,824	12.3	-	-	6,824	12.3	4,305	7.8	-	-		
August	6,983	12.1	-	-	6,983	12.1	4,287	7.5	-	-		
September	6,716	11.9	-	-	6,716	11.9	4,180	7.4	-	-		
October	6,696	11.7	-	-	6,696	11.7	5,036	8.8	-	-		
November	6,701	12.0	-	-	6,701	12.0	4,848	8.7	-	-		
December	7,143	12.4	-	-	7,143	12.4	5,910	10.3	-	-		
TOTAL	78,619	11.5	-	-	78,619	11.5	59,987	8.7	-	-		

	Wakefield						High's						Harvey					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%
January	3,765	6.3	773	1.3	4,538	7.6	-	-	3,180	5.2	3,180	5.2	-	-	2,735	4.6	2,735	4.6
February	3,607	6.9	214	0.4	3,821	7.3	-	-	2,733	5.3	2,733	5.3	-	-	2,442	4.7	2,442	4.7
March	4,404	7.3	14	*	4,418	7.3	-	-	3,403	5.6	3,403	5.6	-	-	2,868	4.7	2,868	4.7
April	4,141	7.1	13	*	4,154	7.1	-	-	3,383	5.8	3,383	5.8	-	-	2,885	4.9	2,885	4.9
May	4,178	7.0	-	-	4,178	7.0	-	-	3,396	5.7	3,396	5.7	-	-	2,666	4.5	2,666	4.5
June	3,956	7.2	-	-	3,956	7.2	-	-	3,560	6.5	3,560	6.5	-	-	2,280	4.0	2,280	4.0
July	4,111	7.4	-	-	4,111	7.4	-	-	3,713	6.7	3,713	6.7	-	-	2,161	3.9	2,161	3.9
August	4,196	7.3	-	-	4,196	7.3	32	0.1	3,728	6.5	3,760	6.6	-	-	2,134	3.7	2,134	3.7
September	4,139	7.4	-	-	4,139	7.4	191	0.3	3,674	6.5	3,865	6.8	-	-	2,313	4.5	2,313	4.5
October	3,884	5.6	-	-	3,884	5.6	-	-	3,607	6.3	3,607	6.3	-	-	2,862	5.0	2,862	5.0
November	2,896	5.2	-	-	2,896	5.2	24	*	3,317	5.9	3,341	5.9	-	-	2,691	4.8	2,691	4.8
December	1,171	2.0	-	-	1,171	2.0	24	*	3,487	6.1	3,511	6.1	-	-	2,648	4.6	2,648	4.6
TOTAL	43,788	6.4	1,014	0.2	44,802	6.6	271	*	41,141	6.0	41,412	6.0	-	-	30,819	4.5	30,819	4.5

	Golden Rule						Sunrise					
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%		
January	668	1.1	-	-	668	1.1	496	0.8	57	0.1		
February	648	1.2	-	-	648	1.2	480	0.9	-	-		
March	729	1.2	-	-	729	1.2	554	0.9	-	-		
April	699	1.1	-	-	699	1.1	673	1.1	-	-		
May	788	1.2	-	-	788	1.2	698	1.1	-	-		
June	545	1.0	-	-	545	1.0	569	1.0	-	-		
July	489	0.8	-	-	489	0.8	335	1.0	-	-		
August	435	0.8	-	-	435	0.8	587	1.0	-	-		
September	898	1.5	-	-	898	1.5	589	1.0	-	-		
October	845	1.5	-	-	845	1.5	-	-	-	-		
November	813	1.5	-	-	813	1.5	-	-	-	-		
December	711	1.2	-	-	711	1.2	-	-	-	-		
TOTAL	8,010	1.2	-	-	8,010	1.2	5,099	0.7	57	*		

	Valley					
	From Assoc.	%	From Others	%	Total	%
January	78	0.1	91	0.2	169	0.3
February	87	0.2	79	0.1	166	0.3
March	71	0.1	83	0.1	154	0.2
April	33	0.1	80	0.2	113	0.3
May	21	*	80	0.1	101	0.1
June	21	*	68	0.1	89	0.1
July	32	0.1	78	0.1	110	0.2
August	26	*	66	0.1	92	0.1
September	47	0.1	44	0.1	91	0.2
October	-	-	50	0.1	50	0.1
November	-	-	59	0.1	59	0.1
December	-	-	72	0.1	72	0.1

PLAINTIFF'S EXHIBIT 120-I

Alexandria

tal	%	From Assoc.	%	From Others	%	Total	%
662	9.5	4,090	6.9	-	-	4,090	6.9
777	9.1	3,987	7.6	-	-	3,987	7.6
947	9.2	4,430	7.3	-	-	4,430	7.3
823	8.9	3,986	6.8	-	-	3,986	6.8
983	9.3	4,437	7.5	-	-	4,437	7.5
689	8.4	3,990	6.5	-	-	3,990	6.5
305	7.8	4,184	7.5	-	-	4,184	7.5
887	7.5	4,166	7.2	-	-	4,166	7.2
180	7.4	4,448	7.9	-	-	4,448	7.9
096	8.8	4,714	8.3	-	-	4,714	8.3
868	8.7	4,340	7.8	-	-	4,340	7.8
910	10.1	4,681	8.1	-	-	4,681	8.1
987	8.7	50,987	7.4	-	-	50,987	7.4

Martin's

tal	%	From Assoc.	%	From Others	%	Total	%
555	0.9	384	0.7	-	-	384	0.7
480	0.9	359	0.7	-	-	359	0.7
558	0.9	396	0.7	-	-	396	0.7
675	1.1	456	0.8	-	-	456	0.8
698	1.1	468	0.8	-	-	468	0.8
969	1.0	417	0.8	-	-	417	0.8
535	1.0	488	0.9	-	-	488	0.9
947	1.0	468	0.8	-	-	468	0.8
589	1.0	543	1.0	-	-	543	1.0
-	-	519	0.9	-	-	519	0.9
-	-	493	0.9	-	-	493	0.9
-	-	449	0.8	-	-	449	0.8
456	0.7	5,440	0.8	-	-	5,440	0.8

PURCHASES BY ALL DAIRIES LOCATED IN THE WASHINGTON METROPOLITAN AREA OF MILK FOR RESALE AS FLUID MILK, 1957. (Excluding Cream & Cottage Cheese)
(All Non-Percentage Figures in Thousands of Pounds
All Percentage Figures Relate to Grand Total)

	GRAND TOTAL						Chestnut Farms						Thompson's						Lacorne						Rahway			
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%
January	46,123	89.5	7,844	14.5	53,967	100.0	20,178	37.4	-	-	20,178	37.4	6,130	11.4	1,475	2.7	7,605	14.1	6,046	11.2	-	-	6,046	11.2	5,292	9.8	-	-
February	40,301	89.9	6,630	14.1	46,931	100.0	17,264	36.8	-	-	17,264	36.8	5,327	11.4	1,416	3.0	6,743	14.4	5,133	10.9	-	-	5,133	10.9	4,422	9.4	-	-
March	46,304	88.0	7,555	14.0	53,859	100.0	20,098	37.3	-	-	20,098	37.3	6,008	11.2	1,530	2.8	7,538	14.0	5,918	11.0	-	-	5,918	11.0	5,015	9.3	-	-
April	44,184	85.1	7,765	14.9	51,948	100.0	19,453	37.4	-	-	19,453	37.4	5,663	10.9	1,721	3.3	7,384	14.2	5,366	10.7	-	-	5,366	10.7	4,700	9.1	-	-
May	44,118	85.0	7,730	15.0	51,848	100.0	19,057	36.7	-	-	19,057	36.7	5,645	10.9	1,893	3.7	7,538	14.6	5,441	10.5	-	-	5,441	10.5	4,823	9.3	-	-
June	41,034	85.0	7,246	15.0	48,280	100.0	18,487	38.3	-	-	18,487	38.3	5,062	10.5	1,688	3.5	6,750	14.0	5,578	11.6	-	-	5,578	11.6	4,049	8.4	-	-
July	41,053	84.9	7,289	15.1	48,342	100.0	17,990	37.2	-	-	17,990	37.2	4,950	10.2	1,633	3.4	6,583	13.6	5,901	12.2	-	-	5,901	12.2	3,700	7.7	-	-
August	42,809	85.7	7,153	14.3	49,962	100.0	19,304	38.6	-	-	19,304	38.6	5,201	10.4	1,519	3.0	6,720	13.4	6,044	12.1	-	-	6,044	12.1	3,648	7.3	-	-
September	42,165	84.8	7,561	15.2	49,726	100.0	17,111	34.4	-	-	17,111	34.4	5,919	11.9	1,641	3.3	7,560	15.2	5,995	12.1	-	-	5,995	12.1	3,572	7.2	-	-
October	42,565	84.4	7,951	15.6	50,896	100.0	18,401	36.2	-	-	18,401	36.2	5,742	11.3	1,755	3.5	7,497	14.8	6,113	12.0	-	-	6,113	12.0	4,561	9.0	-	-
November	41,990	85.1	7,345	14.9	49,335	100.0	18,238	37.0	-	-	18,238	37.0	5,668	11.5	1,580	3.2	7,248	14.7	6,112	12.4	-	-	6,112	12.4	4,479	9.1	-	-
December	41,222	84.7	7,477	15.3	49,032	100.0	18,771	38.3	-	-	18,771	38.3	5,643	11.5	1,573	3.2	7,216	14.7	6,202	12.6	-	-	6,202	12.6	4,712	9.6	-	-
TOTAL	514,581	85.3	89,546	14.7	604,127	100.0	224,352	37.1	-	-	224,352	37.1	66,998	11.1	19,424	3.2	86,382	14.3	70,049	11.6	-	-	70,049	11.6	52,973	8.8	-	-

	High's						Wakefield						Harvey						Golden Rule						Quarles			
	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%	Total	%	From Assoc.	%	From Others	%
January	-	-	2,964	5.5	2,964	5.5	3,165	5.9	650	1.2	3,815	7.1	-	-	2,616	4.8	2,616	4.8	681	1.2	-	-	681	1.2	487	0.9	50	0.1
February	-	-	2,615	5.6	2,615	5.6	3,008	6.4	178	0.4	3,184	6.8	-	-	2,344	5.0	2,344	5.0	597	1.2	-	-	597	1.2	458	1.0	-	-
March	-	-	3,233	6.0	3,233	6.0	3,512	6.6	11	*	3,523	6.6	-	-	2,700	5.0	2,700	5.0	692	1.3	-	-	692	1.3	545	1.0	-	-
April	-	-	3,214	6.2	3,214	6.2	3,399	6.6	11	*	3,410	6.6	-	-	2,741	5.3	2,741	5.3	611	1.2	-	-	611	1.2	675	1.3	-	-
May	-	-	3,226	6.2	3,226	6.2	3,284	6.3	-	-	3,284	6.3	-	-	2,533	4.9	2,533	4.9	686	1.3	-	-	686	1.3	652	1.3	-	-
June	-	-	3,382	7.0	3,382	7.0	3,108	6.4	-	-	3,108	6.4	-	-	2,109	4.4	2,109	4.4	518	1.1	-	-	518	1.1	569	1.2	-	-
July	-	-	3,527	7.3	3,527	7.3	3,316	6.9	-	-	3,316	6.9	-	-	2,053	4.2	2,053	4.2	407	0.8	-	-	407	0.8	535	1.1	-	-
August	32	0.1	3,342	7.1	3,374	7.2	3,415	6.8	-	-	3,415	6.8	-	-	2,027	4.1	2,027	4.1	414	0.8	-	-	414	0.8	547	1.1	-	-
September	191	0.4	3,490	7.0	3,681	7.4	3,392	6.8	-	-	3,392	6.8	-	-	2,387	4.8	2,387	4.8	807	1.6	-	-	807	1.6	565	1.1	-	-
October	-	-	3,427	6.7	3,427	6.7	2,543	5.0	-	-	2,543	5.0	-	-	2,720	5.3	2,720	5.3	821	1.6	-	-	821	1.6	-	-	-	-
November	24	*	3,151	6.4	3,175	6.4	2,356	4.8	-	-	2,356	4.8	-	-	2,556	5.2	2,556	5.2	789	1.6	-	-	789	1.6	-	-	-	-
December	24	0.1	3,313	6.8	3,337	6.9	826	1.7	-	-	826	1.7	-	-	2,317	5.1	2,317	5.1	688	1.4	-	-	688	1.4	-	-	-	-
TOTAL	271	0.1	39,084	6.5	39,355	6.6	35,354	5.9	850	0.1	36,204	6.0	-	-	29,303	4.8	29,303	4.8	7,651	1.3	-	-	7,651	1.3	5,033	0.8	50	*

	Radley					
	From Assoc.	%	From Others	%	Total	%
January	76	0.1	89	0.2	165	0.3
February	81	0.2	77	0.1	158	0.3
March	69	0.1	81	0.2	150	0.3
April	32	0.1	78	0.1	110	0.2
May	21	*	78	0.2	99	0.2
June	21	*	67	0.1	88	0.1
July	32	0.1	76	0.2	108	0.3
August	26	0.1	65	0.1	91	0.2
September	46	0.1	43	0.1	89	0.2
October	-	-	40	0.1	40	*

PLAINTIFF'S EXHIBIT 120-J

	Alexandria					
	From		From			
$	Assoc.	$	Others	$	Total	$
9.8	3,794	7.0	-	-	3,794	7.0
9.4	3,705	7.9	-	-	3,705	7.9
9.3	4,111	7.6	-	-	4,111	7.6
9.1	3,693	7.1	-	-	3,693	7.1
9.3	4,111	7.9	-	-	4,111	7.9
8.4	3,287	6.8	-	-	3,287	6.8
7.7	3,807	7.9	-	-	3,807	7.9
7.3	3,827	7.7	-	-	3,827	7.7
7.2	4,146	8.3	-	-	4,146	8.3
9.0	4,334	8.5	-	-	4,334	8.5
9.1	3,927	7.9	-	-	3,927	7.9
9.6	4,302	8.8	-	-	4,302	8.8
8.8	47,044	7.8	-	-	47,044	7.8

	Martin's					
	From		From			
$	Assoc.	$	Others	$	Total	$
1.0	334	0.6	-	-	334	0.6
1.0	308	0.7	-	-	308	0.7
1.0	336	0.6	-	-	336	0.6
1.3	392	0.7	-	-	392	0.7
1.3	398	0.8	-	-	398	0.8
1.2	355	0.7	-	-	355	0.7
1.1	415	0.8	-	-	415	0.8
1.1	351	0.7	-	-	351	0.7
1.1	421	0.9	-	-	421	0.9
-	428	0.8	-	-	428	0.8
-	397	0.8	-	-	397	0.8
-	357	0.7	-	-	357	0.7
0.8	4,492	0.7	-	-	4,492	0.7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal From the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

WILLIAM J. HUGHES, JR.
821 15th Street, N. W.
Washington 5, D. C.

HERBERT A. BERGSON
DANIEL J. PIERCE
HOWARD ADLER, JR.
DANIEL H. MARCUS
918 16th Street, N. W.
Washington 6, D. C.

Attorneys for Appellant

Of Counsel:

BERGSON & BORKLAND
918 16th Street, N. W.
Washington 6, D. C.

Press of Byron S. Adams, Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal From the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

Appellant, Maryland and Virginia Milk Producers Association, Inc., appeals from the judgment of the United States District Court for the District of Columbia which became final on January 30, 1959, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The opinions of the United States District Court for the District of Columbia, containing the findings of fact and conclusions of law, are reported at 167 F. Supp.

45, 167 F. Supp 799, and 168 F. Supp. 880. Copies of these opinions are set forth in the Appendix, pp. 1a-34a.

JURISDICTION

This is a civil action brought by the United States under Section 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. § 4, commonly known as the Sherman Act, and under Section 15 of the Act of October 15, 1914, 38 Stat. 736, as amended, 15 U.S.C. § 25, commonly known as the Clayton Act, to prevent and restrain alleged violations of Sections 1, 2 and 3 of the Sherman Act and Section 7 of the Clayton Act. Partial judgments were entered by the district court on November 10, 1958, January 22, 1959, and January 30, 1959, all of which became final on the latter date. Fed. R. Civ. P., Rule 54(b). Copies of these judgments are set forth in the Appendix, pp. 35a-38a. Notice of Appeal was filed in the district court on March 11, 1959.[1] The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 828 (15 U.S.C. § 29), as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989 (28 U.S.C. § 2101).

The following decisions, *inter alia*, sustain the jurisdiction of this Court to review the judgment on direct appeal: *Northern Pacific Railway Company* v. *United States*, 356 U.S. 1; *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242; *United States* v. *Radio Corporation of America*, 358 U.S. 334.

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[1] The United States also filed a Notice of Appeal, on March 23, 1959.

STATUTES INVOLVED

The statutes under which the action was brought, Sections 1-4 of the Sherman Act and Sections 7 and 15 of the Clayton Act, are set forth in the Appendix, pp. 38a-41a. Appellant's defense of exemption upon which this appeal is based rests principally on Section 6 of the Clayton Act, 38 Stat. 731 (15 U.S.C. § 17) and the Capper-Volstead Act, Act of February 18, 1922, 42 Stat. 388 (7 U.S.C. §§ 291, 292), which are set forth in the Appendix, pp. 40a, 43a-45a.

QUESTIONS PRESENTED

1. Is a duly qualified cooperative association of milk producers deprived of the antitrust exemption conferred by Section 6 of the Clayton Act and the Capper-Volstead Act, and subject to prosecution under:

(a) Section 7 of the Clayton Act, when it expands its operations to the authorized functions of processing and distributing milk by acquiring the assets of a non-exempt dairy corporation, or

(b) Section 3 of the Sherman Act, when it acquires the above assets from a non-exempt dairy corporation pursuant to a purchase contract with normal ancillary covenants by the vendor not to compete within the metropolitan area for a 10-year period, absent a finding that the transaction was part of a combination or conspiracy, or was made for the purpose or with the effect of bestowing an anti-competitive benefit on the non-exempt vendor?

2. Where the Secretary of Agriculture has investigated the acquisition of assets of a dairy corpora-

tion by a cooperative association of milk producers and has advised the Attorney General that he finds no evidence of violation of the Capper-Volstead Act, is the cooperative nevertheless subject to prosecution under Section 7 of the Clayton Act which by its terms (a) is applicable only to asset acquisitions by corporations "subject to the jurisdiction of the Federal Trade Commission" and (b) is inapplicable to "transactions duly consummated pursuant to authority given by . . . the Secretary of Agriculture"?

STATEMENT

On July 26, 1954, the Maryland and Virginia Milk Producers Association (hereinafter referred to as the Association), a cooperative organization of nearly 2,000 milk producers serving the Washington metropolitan area, acquired substantially all of the assets of Embassy Dairy, Inc., a local dealer, or dairy, engaged in the distribution and sale of milk in the Washington metropolitan area. On November 21, 1956, the United States filed a civil antitrust action against the Association. The complaint charged:

(1) that through various anti-competitive practices including the acquisition of dealer outlets, the Association had attempted to monopolize and had monopolized trade and commerce in the supplying of raw milk to dealers for processing and resale as pasteurized fluid milk in the Washington metropolitan area, in violation of Section 2 of the Sherman Act;

(2) that the Association's acquisition of the Embassy assets had and might have the effect of substantially lessening competition or tending

to create a monopoly in the production and sale of raw milk to, and the distribution and sale of pasteurized fluid milk by, Washington metropolitan area dealers, in violation of Section 7 of the Clayton Act; and

(3) that the contracts under which the Association acquired the Embassy assets were made for the purpose of eliminating Embassy as an outlet for raw milk produced by others, and to eliminate competition between Embassy and dealers purchasing raw milk from the Association, in unreasonable restraint of trade and commerce in the Washington metropolitan area in violation of Sections 1 and 3 of the Sherman Act.

On February 7, 1957, the United States amended its complaint under Sections 1 and 3 so as to charge that the Embassy assets were purchased pursuant not merely to a contract but to "an unlawful combination and conspiracy" with the vendor and others to eliminate and foreclose competition in the Washington metropolitan area. On December 10, 1957, the United States further amended its complaint to add the charge that the Association's acquisition of the so-called Richfield-Wakefield Dairy on December 6, 1957, violated Section 7 of the Clayton Act.

The Association, in its answer, denied the alleged violations and, among various affirmative defenses, asserted that it was exempt from prosecution by virtue of the provisions of Section 6 of the Clayton Act and of the Capper-Volstead Act. When the case came on for trial in the Fall of 1958, the court ordered that the question of the Association's asserted exemption from the antitrust laws be tried first. Following the

exemption trial, separate trials were held on the Clayton Act allegations and on those under Sections 1 and 3 of the Sherman Act.

On October 16, 1958, in the first of three opinions, the court ruled that the Association was (1) an agricultural organization "instituted for purposes of mutual help, and not having capital stock or conducted for profit," within the meaning of Section 6 of the Clayton Act (App. 5a); and (2) an association of "persons engaged in the production of agricultural products" as farmers or dairymen, complying with the detailed requirements of Section 1 of the Capper-Volstead Act (App. 6a). The court then ruled as a matter of law that the Clayton and Capper-Volstead Acts rendered the Association

> "entirely exempt from the provisions of the antitrust laws, both as to its very existence as well as to all of its activities, provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities" (App. 11a).

Applying this ruling to the allegations of the complaint, the district court dismissed the monopolization charges under Section 2 of the Sherman Act (judgment dated November 10, 1958, App. 35a) but sustained and ordered to trial the charges under Sections 1 and 3 of the Sherman Act and Section 7 of the Clayton Act.

Following the exemption decision the district court proceeded with a separate trial on the merits of the Section 7 cases. Evidence was adduced both on the competitive effects of the acquisitions and on the Association's exemption defense. On November 21, 1958, the court rejected the claim of exemption and

adjudged the Association's acquisition of Embassy to have violated Section 7 of the Clayton Act; it simultaneously held the acquisition of Richfield-Wakefield to be lawful under the "failing corporation" doctrine established by this Court in *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291. The Association was ordered to divest itself of the Embassy assets and cancel all contracts ancillary to that transaction (App. 14a).

On January 12, 1959, the court conducted a separate trial on the alleged combination and conspiracy under Sections 1 and 3 of the Sherman Act. Both sides presented the case solely on the record of the prior hearings. No evidence was offered by the United States, and the trial court made no finding, that the Association had combined or conspired with anyone to effect the Embassy acquisition, or that any anti-competitive benefit accrued to the vendor of the assets. The trial court on January 14, 1959, nevertheless concluded

> "that the transaction involving the acquisition of Embassy Dairy by the Defendant constitutes a violation of Section 3 of the Sherman Act" (App. 34a).

No additional relief against the Association was ordered under Section 3. On January 22, 1959, judgment was entered on both the Section 7 and Section 3 cases (App. 35a). By judgment dated January 30, 1959, the court dismissed the complaint under Section 1 of the Sherman Act (App. 37a).

This appeal by the Association challenges the validity of the judgment of January 22, 1959, under which the Association's acquisition of the Embassy

assets was found to have violated Section 7 of the Clayton Act and Section 3 of the Sherman Act. In a cross-appeal the United States has challenged (1) the judgment of November 10, 1958, dismissing the monopolization cause of action, and (2) the adequacy of the relief granted on January 22, 1959, with respect to the Embassy acquisition. The United States has not appealed from the judgment sustaining the Richfield-Wakefield acquisitions.

THE QUESTIONS ARE SUBSTANTIAL

This Court has long recognized that farmer cooperatives occupy a special and privileged status in relation to the antitrust laws. *United States* v. *Rock Royal Co-op,* 307 U.S. 533, 560, 563; *Tigner* v. *State of Texas,* 310 U.S. 141; *Associated Press* v. *United States,* 326 U.S. 1, 14. This appeal raises for the first time the question of the extent to which that privilege exempts a cooperative from prosecution for acquiring assets in restraint of trade.

1. The Conflict With Applicable Decisions of This Court

In *United States* v. *Borden Co.,* 308 U.S. 188, this Court, confronted with a "combined attempt of all the defendants, producers, distributors and their allies, to control the market," held that the Capper-Volstead Act's exemption for farmer cooperatives did not extend to "authorizing the sort of conspiracies between producers and others that are charged in this [Sherman Act § 1] indictment." 308 U.S. at 206. Several years later, in *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797, this Court, relying on *Borden,* held that exempt organizations lose their

antitrust immunity when they "aid and abet manufacturers and traders in violating the Sherman Act." 325 U.S. at 810. Prior to the ruling challenged here, the lower federal courts had consistently interpreted *Borden* and *Allen Bradley* as denying exemption to a labor or agricultural organization only where it engaged in a transaction with non-exempt persons which amounted to a combination or conspiracy with outsiders "who are themselves violating the antitrust laws." *New Broadcasting Co.* v. *Kehoe*, 94 F. Supp. 113, 115 (S.D.N.Y. 1950); *Anderson-Friberg, Inc.* v. *Justin R. Clary & Son*, 98 F. Supp. 75 (S.D.N.Y. 1951); *Courant* v. *International Photographers*, 176 F. 2d 1000 (9th Cir. 1949).

The conflict presented by this appeal is brought sharply into focus by the shifting rulings of the district court in the course of the trial. At the outset, in its October 16, 1958, opinion, the court interpreted *Borden* to mean that an agricultural cooperative is entirely exempt from the antitrust laws "provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities" (App. 11a). Accordingly, the court sustained the Association's exemption defense to the Section 2 charge of monopolizing and attempting to monopolize, since that charge alleged no combination or conspiracy. In so ruling, the court was mindful of the fact that one of the grounds expressly[2] relied on by the United States for that charge was that the Association, with monopolistic intent, had acquired the assets of Embassy Dairy. In the same opinion,

[2] See Particulars furnished by the United States, Nos. b. 14, d. 2, k. 4 (R. 1712, 1713, 1731); and the colloquy between the court and government counsel (R. 622-623).

the court left standing the amended complaint's allegations against the Embassy transaction under Sections 1 and 3 of the Sherman Act because these allegations did charge "combination and conspiracy" (App. 13a), as *Borden* requires. The reasons why the court simultaneously let the Section 7 charge against the Association remain are obscure (App. 13a, 16a).[3]

When the Embassy acquisition went on trial, however, the United States offered no evidence and the court made no finding of conspiracy or combination. Moreover, the United States offered no evidence and the court made no finding that any person other than the Association had violated the antitrust laws or restrained trade in respect of the Embassy transaction. In short, the United States did nothing to substantiate its amendment to the complaint which attempted to transform the Association's acquisition of Embassy from a mere "contract" into an "unlawful combination and conspiracy." Despite this evidential void, the district court held the Association to have lost its exemption and to have violated Section 7 and Section 3. Significantly, however, the court at the close of the evidence rephrased its own interpretation of the *Borden* rule as follows:

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[3] The Court in its October 16th opinion stated:

"The defendant claims that this provision is not applicable to it because the Capper-Volstead Act empowers it to make necessary contracts and agreements to effect its purposes. The Court does not agree with this contention. It is a well-known principle of law that repeals by implication are not favored, and unless there is a clear repugnancy between an earlier and later statute, the two statutes must be so construed as to give effect to each" (App. 13a-14a).

> "an agricultural cooperative was immune from the antitrust laws unless and except when it entered into *transactions* with [outsiders]" (App. 31a, emphasis added).

It was on this basis that the court ruled that "the *transaction* involving the acquisition of Embassy Dairy" violated Section 3 of the Sherman Act (App. 34a).

If transactions with outside parties were sufficient to deprive agricultural cooperatives of their antitrust exemption, Section 6 of the Clayton Act and the Capper-Volstead Act would be idle exercises in legislation. The provisions of those statutes would confer an illusory privilege available only to those who remain dormant. Farmers, like labor, needed no act of Congress in 1914 or 1922 to permit them simply to join an organization. What they sought and obtained was authorization to mobilize their economic power and engage collectively in transactions with outsiders, transactions which inevitably, because of the anti-competitive character of the cooperative venture, would to some degree restrain trade. History demonstrates that these enactments were the outgrowth of prosecutions and threats to impose antitrust sanctions on the collective bargaining of labor with business, the collective entry of farmers into markets of commerce. For these reasons, the district court's equation of "contract" or "transaction" with "combination and conspiracy" under Section 3 is erroneous (*Adams Dairy Company* v. *St. Louis Dairy Company*, 260 F. 2d 46 (8th Cir. 1958), and *United States* v. *Kissel*, 218 U.S. 601), nullifies the statutory exemption, misapprehends the decision in *Borden*, and justifies review by this Court.

The district court's Section 7 ruling also misinterprets *Borden*. Neither that statute, nor the allegation under it, speak in terms of combination or conspiracy. Rather, like the charge under Section 2 of the Sherman Act, the allegation under Section 7 of the Clayton Act was directed solely against the conduct of a single party—the acquiring corporation. The district court, however, shifted its ground. Although it had previously dealt with the Embassy acquisition as non-conspiratorial action entitling the Association to exemption under Section 2, it turned around and treated the same acquisition as joint action with an outsider disqualifying the exemption as to Section 7. Moreover, the court destroyed the doctrine that the Clayton Act attacks in its incipiency conduct which, when full blown, will violate the Sherman Act, S. Rep. 1775, 81st Cong., 1st Sess. (1950). Under the district court's decisions, attempts to monopolize and the achievement of monopoly by a cooperative are properly acknowledged to be exempt from the Sherman Act; yet identical conduct alleged only as tending to monopoly or lessening competition is prohibited by the Clayton Act. Such conflicts between the court's own Sherman and Clayton Act rulings on the identical set of facts point up the departure from *Borden* and add impetus to the need for review by this Court.

2. The Distortion of the Capper-Volstead Act

By holding that the Association, apart from combination or conspiracy, had restrained trade in violation of the Sherman and Clayton Acts, the district court wholly misconstrued the purpose of the Capper-Volstead Act. It treated the enforcement scheme

provided in Section 2 of Capper-Volstead as a mere supplement to the arsenal of antitrust remedies available against the non-conspiratorial conduct of cooperatives. In so doing, it treated Capper-Volstead as having precisely the opposite effect from that intended by Congress.

We contend that, absent participation in a combination or conspiracy, Section 2 of the Capper-Volstead Act was designed to provide the exclusive procedure by which antitrust remedies could be brought to bear upon cooperative activity adversely affecting competition. Our contention in this respect is wholly in accord with the opinion announced by this Court in *United States* v. *Radio Corporation of America*, 358 U.S. 334, where the determination of whether FCC approval of a station transfer precluded antitrust attack by the Department of Justice was shown to depend upon an examination of the intention of Congress in enacting the Communications Act.

Because this Court in *Borden* found that the cooperative had exceeded its immunity by joining in a conspiracy with others, there was no occasion in that case for reviewing Capper-Volstead to ascertain the application of its provisions to acts by a cooperative association standing alone. Such a review, appropriate here, would disclose a remarkable legislative history. The debates in two Congresses, when read in their entirety, irresistibly compel the conclusion that Capper-Volstead, as finally enacted, was intended to clarify the Clayton Act exemption so as authoritatively to remove cooperatives acting alone from the threat of antitrust prosecution initiated by the Department of Justice; that they were to be placed instead under the initial juris-

diction of the Secretary of Agriculture; that monopoly or restraint of trade by a cooperative was not to be actionable unless "the price of any agricultural product is unduly enhanced by reason thereof"; but that once such finding of undue enhancement was made by the Secretary, the full arsenal of antitrust remedies was to be available against the cooperative in a district court, with prosecution to remedy "the monopolization or restraint of trade" placed in the hands of the Attorney General.

This legislative design is abundantly confirmed by a careful examination of the language of Section 2 of Capper-Volstead, and comparison with provisions of the Clayton Act as they stood in 1922. Such a study discloses that the Clayton Act, in Sections 11 and 15, had established a dual system of enforcement under which the Federal Trade Commission, by agency proceedings subject to court of appeals review, and the Department of Justice, by original equity actions in a district court, could each proceed with antitrust enforcement. In drafting Section 2 of the Capper-Volstead Act, Congress amalgamated the dual remedies of Sections 11 and 15 into a single cohesive and consecutive procedure to govern all cases involving charges of monopolization or restraint against cooperatives acting alone. Justice Department equity enforcement was to follow, rather than be alternative to, quasi-judicial proceedings by an agency. And Congress, after debating the choice of the quasi-judicial agency, explicitly rejected the Federal Trade Commission in favor of giving the Secretary of Agriculture the right to initiate and conduct proceedings involving cooperatives, because of the Secretary's greater familiarity with agricultural practices and prices (62 Cong. Rec. 2279).

The United States conceded below that no finding of violation of Capper-Volstead by the Secretary of Agriculture preceded its complaint, and that the Attorney General had not been requested by the Secretary of Agriculture to proceed against the Association (Defendant's Exhibit 67). By proceeding apart from the means prescribed by Section 2 of Capper-Volstead, the district court turned Capper-Volstead upside down and interpreted it simply as a statute by which Congress designed a third antitrust enforcement vehicle, to impose on cooperatives alone concurrent liability to prosecution by three federal agencies — Justice, Federal Trade Commission and Agriculture. It is to undo this distortion of a law designed to aid agricultural cooperatives that review by this Court is sought.

3. The Specific Exclusion of Acquisitions by Cooperatives From Amended Section 7 of the Clayton Act

The last paragraph of Section 7 of the Clayton Act, added by amendment in 1950, provides that

> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board."

Prior to the decision below, those provisions of the paragraph which deal with the Secretary of Agri-

culture had never been judicially interpreted. At trial, the Association argued that the inclusion of the Secretary in that paragraph had been designed by Congress to exclude acquisitions by farmer cooperatives from the prohibitions of Section 7. The court rejected this contention on the grounds that (1) no statute expressly empowered the Secretary to approve any acquisition, and (2) the acquisition was not authorized by the Secretary (App. 29a).

The lower court's ruling effectively nullifies the pertinent part of Section 7, since no statute, to our knowledge, gives the Secretary of Agriculture specific authority to approve any acquisition at all. A review of the background of this provision would demonstrate, however, that in 1922 Congress through Section 1 of the Capper-Volstead Act expressly authorized producer cooperatives to integrate vertically by permitting them to make contracts necessary to engage collectively in the successive functions of "processing, preparing for market, handling, and marketing" (App. 43a); that Congress in 1926 established a Division of Cooperative Marketing (now the Farmer Cooperative Service) to render services to producer associations engaged in all phases of cooperative marketing (7 U.S.C. § 452 *et seq.*); that in this very case the Farmer Cooperative Service rendered favorable assistance in connection with the Association's acquisition of the Embassy facilities (Defendant's Exhibits 19, 65); that Congress in 1929 passed the Agricultural Marketing Act "to promote the effective merchandising of agricultural commodities . . . by encouraging the organization of producers into effective associations . . . for greater unity of effort in marketing" (12 U.S.C. § 1141(a)), and therein

explicitly directed the Farm Credit Administration to make loans to cooperatives for "the construction or acquisition . . . of physical facilities" (12 U.S.C. § 1141e(a)(2)); and that in this very case the Embassy facilities were acquired by the Association with a loan granted pursuant to that statutory directive (Defendant's Exhibit 20).

Against this background it is highly significant to note that the prohibition which Congress added to Section 7 of the Clayton Act in 1950 itself contained an important limitation, underscored below, by providing that

> "no corporation *subject to the jurisdiction of Federal Trade Commission* shall acquire the whole or any part of the assets of another corporation, etc."

As previously noted, Congress in 1922 had expressly rejected an amendment to Capper-Volstead which would have placed cooperatives under the jurisdiction of the Federal Trade Commission (62 Cong. Rec. 2279). By this legislative history, as well as by precedent, *Fruit Growers' Express, Inc.* v. *Federal Trade Commission*, 274 Fed. 205 (7th Cir. 1921), the Federal Trade Commission has antitrust jurisdiction only over those industries not specifically subject to the jurisdiction of a specialized agency. Accordingly, Section 7's prohibitive language does not reach agricultural cooperatives which, being subject to the Capper-Volstead jurisdiction of the Secretary of Agriculture, are removed from the jurisdiction of the Federal Trade Commission.

It should not be surprising then to find that the last paragraph added to Section 7 in 1950 was intended to

exclude cooperatives whose activities were subject to the Secretary's authority. As stated at page 7 of the House Report 1191 (81st Congress, 1st Session):

> "The last paragraph of section 7 is new. It simply provides that provisions of the bill *should not apply to corporations coming under the jurisdiction of* ICC, CAA, FCC, FPC, SEC, and *the Secretary of Agriculture.* These agencies already have jurisdiction over these corporations, and there is no disposition to change the present arrangement regarding them" (emphasis added).[4]

Review by this Court is needed to restore to Section 7 the meaning which Congress intended.

4. The Impact on Cooperatives

The ruling below raises questions of substantial importance to the growth and legality of the agricultural cooperative movement in the United States.

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[4] This amendment was inserted in 1950 after testimony was given in committee hearings by the Secretary of National Cooperative Milk Producers Federation. Representing 83 farmer-owned and farmer-controlled dairy cooperatives collectively owning approximately 800 dairy plants, he urged a specific exclusion for Capper-Volstead cooperatives, stating:

> "The legislation proposed to this committee may not be aimed at agricultural cooperatives. Yet the bill, as drawn, is subject to interpretations which would nullify rights accruing to farmer cooperatives under the Capper-Volstead Act, would wipe out the power of the Secretary of Agriculture, a technically informed and naturally understanding agency, to determine whether cooperative activities have begun to run counter to public interest, and relegate farmers to the conditions of uncertainty which prevailed prior to the passage of the act." Hearings Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, on H.R. 515, page 104 (80th Cong., 1st Sess.).

For more than forty years farmers have been authorized by Congress and encouraged by the Department of Agriculture to combine in cooperative organizations for—in the words of the Capper-Volstead Act—"collectively processing, preparing for market, handling, and marketing" their products. Because of their effectiveness in combating the perennial problem of low prices for farm products, farmer cooperatives have become a commonplace in the agricultural economy of our country: "three out of every five farmers are now members of supply or marketing associations."[5] In recent years, the Department of Agriculture, through the Secretary, the Farmer Cooperative Service, the Farm Credit Administration and others, has actively encouraged farmers to build bigger cooperatives and has, in turn, spurred cooperatives to merge for greater strength and to integrate vertically for greater control over the marketing of farm products.[6]

The policy advocated by the Department bears no idle relation to the facts of this case. The undisputed evidence showed that funds with which to consummate the Embassy purchase were in fact loaned to the Association by the Baltimore Bank for Cooperatives

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[5] Speech delivered by Secretary of Agriculture Benson to the American Institute of Cooperation, August 25, 1958 (USDA 2364-58), page 8.

[6] *Ibid.* Secretary Benson stated:

> "It is often in their own cooperatives that farmers have the best means of making vertical and other forms of integration work for them. I urge you cooperative leaders: Broaden your services to take care of the major needs of producers—provide the needed processing and marketing facilities . . ."

(Defendant's Exhibit 20), a federal agency, pursuant to the provisions of the Agricultural Marketing Act of 1929, after receipt of an analysis by the Dairy Branch, Farmer Cooperative Service, Department of Agriculture, of the advantages and disadvantages of the transaction (Defendant's Exhibit 19). Moreover, the evidence showed that this prosecution of the Association was undertaken by the Department of Justice after the Secretary of Agriculture had advised the Attorney General that his Farmer Cooperative Service rendered advisory assistance prior to the acquisition, stating that

> "the purchase was made for the purpose of enabling the cooperative to gain better information regarding the retail market; to bargain more effectively; and to serve its members more advantageously" (Defendant's Exhibit 65).

The decision below produces a dramatic conflict between coordinate branches of the federal government on the application of acts of Congress—antitrust and agricultural cooperation—which themselves inherently conflict in their basic premises. Review by this Court is essential to define the permissible scope of agricultural cooperative integration and safeguard farmer cooperatives from prosecution by the Department of Justice for following the advice of the Department of Agriculture.

CONCLUSION

The questions presented are substantial and of considerable importance to the farmer cooperative movement throughout the United States. For these reasons we respectfully urge that probable jurisdiction be noted.

WILLIAM J. HUGHES, JR.
821 15th Street, N. W.
Washington 5, D. C.

HERBERT A. BERGSON
DANIEL J. FREED
HOWARD ADLER, JR.
DANIEL H. MARGOLIS
918 16th Street, N. W.
Washington 6, D. C.

Attorneys for Appellant

Of Counsel:

BERGSON & BORKLAND
918 16th Street, N.W.
Washington, D. C.

MAY, 1959

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APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 4482-56

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, *Defendant*.

Opinion of October 16, 1958

HOLTZOFF, District Judge.

This is a civil action brought by the United States against the Maryland and Virginia Milk Producers Association, Incorporated, under the antitrust laws, for injunctive and other similar relief. Among the defenses pleaded by the defendant are assertions that under the Clayton Act and the Capper-Volstead Act the defendant, as an agricultural cooperative organization, is exempt and immune from the provisions of the anti-trust laws in respect to the activities of which the government complains. A further defense is that the Secretary of Agriculture has primary jurisdiction of one of the activities concerning which complaint is made. Pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., the Court has ordered a separate trial of these defenses in view of the fact that if they are sustained in whole or in part they may be finally dispositive of either the entire litigation or some aspects of it.

The complaint is not divided into separate counts, as the Rules permit, but it in effect sets forth three separate claims for relief or causes of action. Although they are not separately numbered in the complaint, they are in fact distinct.

The first cause of action, contained in Paragraphs 21, 22, and 23 of the complaint, alleges that the defendant has attempted to monopolize and has monopolized interstate trade and commerce in supplying milk for resale as fluid milk in the area comprising the District of Columbia and certain regions in Maryland and Virginia adjoining the District of Columbia. This cause of action is based on Section 2 of the Sherman Act, 15 U.S.C.A. § 2, which reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor."

The second cause of action, pleaded in Paragraphs 24, 25, 26, 27 and 28 of the complaint, charges a combination and conspiracy to eliminate and foreclose competition in the Washington metropolitan area by making and carrying out a contract for the transfer to the defendant of substantially all of the assets of a concern known as the Embassy Dairy, which is a retail outlet for milk in the Washington metropolitan area. This cause of action is predicated on Sections 1 and 3 of the Sherman Act. Section 1 of the Sherman Act, 15 U.S.C.A. § 1, reads as follows, insofar as is pertinent to the issues of this case:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 3 of the Sherman Act, 15 U.S.C.A. § 3, reads, in part, as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal."

The third cause of action is found in Paragraphs 29 and 29(a) of the complaint, and charges that the defendant on July 26, 1954, purchased and acquired substantially all of the assets of the Embassy Dairy and that the effects of this acquisition have been and may be substantially to lessen competition or to tend to create a monopoly in the production and sale of milk to dealers in the Washington metropolitan area. It is further charged that with the same effect the defendant on December 6, 1957, purchased and acquired all of the outstanding stock of Richfield Dairy Corporation and Simpson Brothers, Incorporated. This cause of action is founded on Section 7 of the Clayton Act, 15 U.S.C.A. § 18, the pertinent portions of which read as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

As a result of lengthy and detailed discovery proceedings, as well as by proof at the trial, the following pertinent facts that are relevant to the defenses now being tried have been developed. The defendant, Maryland and Virginia Milk Producers Association, Incorporated, is a

Maryland corporation having its principal office in the District of Columbia. It is an agricultural cooperative association, having as members nearly two thousand milk producers, that is, persons owning or operating dairy farms at which milk is produced, most of the members being located in the States of Maryland and Virginia. The milk is delivered by the members to the defendant, which acts as the marketing agency for them. Most of the milk is sold eventually to dealers in the Washington metropolitan area. The defendant also owns a plant at which it transforms surplus milk into various milk products, such as ice cream. These by-products are shipped to other markets. The net worth of the defendant corporation is approximately five million dollars. Most of its members are natural persons. Some, however, are partnerships and some are corporations. Some of the members devote all or a major portion of their time and energy to operating their dairy farms themselves. Some of them operate their farms through employees and are engaged principally in other occupations.

The defendant claims to be exempt from the provisions of the antitrust laws under two distinct statutes. The first is Section 6 of the Clayton Act, which became law on October 15, 1914. Its pertinent portions, 15 U.S.C.A. § 17, read as follows:

> "Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, institnted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

The second statute under which immunity is claimed is Section 1 of the Capper-Volstead Act, which became law

on February 18, 1922. This provision, 7 U.S.C.A. § 291, reads as follows:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> "First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
>
> "Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> "And in any case to the following:
>
> "Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members."

The first question to be determined is, whether these two statutes, or either of them, are applicable to this defendant. So far as the Clayton Act is concerned, it comprehends within its scope all agricultural organizations instituted for the purposes of mutual help and not having capital stock or conducted for profit. Unquestionably, the defendant is an agricultural organization. It is instituted for the purposes of mutual help because it acts as the marketing agency for all of its members and pays over to its members the proceeds of the milk sales, with a deduction, of course, for overhead and similar expenses. The defendant does not have capital stock and it is not conducted for profit except as such profit may accrue to its members.

Clearly, therefore, the defendant is within the scope of the Clayton Act.

The next query is, whether it is within the scope of the Capper-Volstead Act, which has been quoted. As has been stated, that statute authorizes persons engaged in the production of agricultural products as farmers or dairymen to act together in associations, corporate or otherwise, with or without capital stock. It is urged by the government that the words "dairymen" and "farmers" should be restricted to natural persons who personally work on dairy farms and who derive the major portion of their income from the farms. The Court sees no basis for such a restricted definition. The owner or operator of a dairy is a dairyman, whether he personally works on his dairy or has the work done by employees. So, too, the owner of a farm may be regarded as a farmer even though he devotes the major portion of his activities to other pursuits. When Congress desired to put a more circumscribed definition on the term "farmer" it do so expressly, as is true of the Bankruptcy Act, 11 U.S.C.A. § 1 et seq. The Court, therefore, is of the opinion that it is immaterial whether every member of the association personally works on his farm or whether every member of the association is a natural person or a corporation. Under these circumstances, the Court concludes that the defendant corporation is of the type that is comprehended within the terms of the Capper-Volstead Act.

The next question is, whether it qualifies under the provisos contained in the Act. Taking first the third proviso, because that is applicable to all corporations, claiming the benefits of the statute, namely, that the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members, it is not disputed that this condition is met. As to the first and second provisos, the law does not require compliance with both but merely with either one. The first proviso imposes a condition that no member of the

association shall be allowed more than one vote. The proof shows that this condition has been met. It therefore becomes unnecessary to decide whether the second proviso is also complied with. The Court, consequently, reaches the conclusion that the defendant corporation is entitled to the benefits of both the Clayton and Capper-Volstead Acts and to the exemptions and immunities conferred by those two statutes.

We then reach the main question to be determined, whether these exemptions and immunities are sufficiently broad to cover the activities of which the Government complains. This brings us back to the precise provisions of, first, the Clayton Act, and then the Capper-Volstead Act.

Section 6 of the Clayton Act, on which the defendant relies, 15 U.S.C.A. § 17, provides in its pertinent clauses that:

> "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of agricultural * * * organizations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

If we compare these provisions with the provisions of Section 1 of the Capper-Volstead Act, 7 U.S.C.A. § 291, which has been quoted above, we reach inescapably the conclusion that in effect the Capper-Volstead Act adds nothing to the immunities and exemptions of the Clayton Act except to extend them to corporations having capital stock and except to make the provisions of the earlier statute more definite and specific. How far the exemptions and immunities of the two statutes extend is a question of novel impression. Although the Clayton Act was

enacted as far back as 1914 and the Capper-Volstead Act as far back as 1922, this question has not been definitely determined and is still open. Perhaps this circumstance is due to the fact that but few attempts have been made to prosecute agricultural cooperatives.

First and foremost, the two statutes provides that an agricultural cooperative shall not as such be considered an illegal combination or conspiracy in restraint of trade under the antitrust laws. In other words, such organizations are not per se illegal combinations or conspiracies in restraint of trade. This much is not disputed. There is a controversy, however, as to whether the statutes should be construed as not being limited to covering the mere existence of agricultural cooperatives but as extending to all of the activities of such cooperatives in connection with their legitimate agricultural business. An examination and scrutiny of the provisions of the statutes are required in order to solve this problem.

At the outset, it must be noted that the Clayton Act exempts from the antitrust laws the existence and operation of such organizations. It is not limited to their existence but includes both existence and operation. Moreover, the last clause of the Clayton Act provides that such organizations or members thereof shall not be held or construed to be illegal combinations or conspiracies in restraint of trade. If that clause stood alone, we would be confronted with a different situation. But it is quite apparent that the Congress, in enacting the Clayton Act, covered not only the existence of such organizations but also their activities and operations and exempted both from the antitrust laws.

The same result is reached by an examination of the Capper-Volstead Act, which authorizes persons engaged in the production of agricultural commodities to join together in associations and authorizes such associations, and their members to make necessary contracts and agreements to

effect their purposes. Obviously, the Capper-Volstead Act is not limited to granting immunity to such associations in respect solely to their existence but extends likewise to their activities.

Support for this conclusion is derived from the reports of Congressional committees in respect to the legislation involved in this case. Chairman Clayton of the House Committee on the Judiciary, in a report dated May 6, 1914, House Report No. 627, 63d Congress, 2d Session, states, on page 36:

> "The object of Section 7 is to make clear certain questions about which doubt has arisen as to whether or not fraternal, labor, consumers, agricultural, or horticultural organizations, orders, or associations, organized for mutual help, not having capital stock or conducted for profit, come within the scope and purview of the Sherman antitrust law."

At page 38 he says that Section 7 of the bill will:

> "Recognize as legal the existence and operations of fraternal, labor, consumers, agricultural, or horticultural organizations, orders or associations, organized for purposes of mutual help, and not having capital stock or conducted for profit."

And then he adds:

> "It also guarantees to individual members of such organizations, orders, or associations, the right to pursue without molestation or legal restraint the legitimate objects of such association."

The report of the Senate Judiciary Committee, filed by Senator Culberson on July 22, 1914, Senate Report 698, 63rd Congress, 2d Session, contains the following statement:

> "The other important and general purposes of the bill are to exempt labor, agricultural, horticultural, and other organizations from the operation of the antitrust acts."

The Government argues that the exemption and immunity from antitrust laws conferred upon agricultural cooperatives should be deemed to extend to certain types of restraints but not to others. To say that it should extend only to reasonable restraints would be fallacious because no legislation was necessary to permit reasonable restraints of trade. They are not banned under the antitrust acts. Consequently, if any restraints are immune from the antitrust acts as a result of the legislation we are considering, they must be unreasonable restraints of trade. The Government argues, however, apparently, that some unreasonable restraints, possibly mild in character, should be permitted, whereas those that are more reprehensible and perhaps predatory should not be deemed exempt or immune under either the Clayton Act or the Capper-Volstead Act. There is no basis in the statutes, however, for separating unreasonable restraints that would otherwise come within the provisions of the antitrust acts into two categories and concluding that some come within the exemption and others do not. To reach any such result would be for this Court to legislate by amending an act of Congress. This the Court cannot do because the Congress itself has not done it.

There are indeed well-recognized limitations on the immunities and exemptions granted by the legislation. The exemptions are accorded and immunities are conferred on agricultural cooperatives and their activities. When they step outside of their field and conspire with persons who are not producers of agricultural commodities, they are beyond the scope of the exemptions. This was held by the Supreme Court in United States v. Borden Company, 308 U.S. 188, 204, 60 S. Ct. 182, 84 L.Ed. 181, which was followed by the Court of Appeals for this Circuit in United States v. Maryland & Virginia Milk Producers Association, 85 U.S. App. D.C. 180, 182, 179 F.2d 426, where it was pointed out that a combination of producers and distributors, the latter not being within the terms of the statutes, is not privileged.

This distinction was formulated by this Court in United States v. Maryland Cooperative Milk Producers, Inc., 145 F. Supp. 151, 153-154, where the Court stated:

> "The obvious purpose of the Clayton Act was to liberate combinations of farmers and their cooperative organizations from the prohibitions of the antitrust laws as long as they do not combine with others who are outside of this category."

The Government relies on the cases of Local 36 of International Fishermen & Allied Workers v. United States, 9 Cir., 177 F.2d 320, 332, and Gulf Coast Shrimpers and Oystermans Association v. United States, 5 Cir., 236 F.2d 658, 664-665. Each of these decisions, however, is distinguishable. The former involved a combination of fishermen and dealers and, therefore, a combination within the ban of the Borden case. The latter presented a situation in which the association did not act as an agency for its members but in which sales were made directly by members to dealers.

It must be mentioned in passing that, of course, the exemptions and immunities extend only to provisions of the antitrust acts. They do not confer any right to violate any other statute, criminal or civil. Also, it must be borne in mind that the exemptions and immunities relate solely to activities in connection with agricultural products. If an organization such as the defendant should step outside of that field and carry on business in products of a different nature, then the provisions of the Clayton and Capper-Volstead Acts would not apply.

Subject to these exceptions, the Court is of the opinion that an agricultural cooperative is entirely exempt from the provisions of the antitrust laws, both as to its very existence as well as to all of its activities, provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities. The public does have another remedy against what would other-

wise constitute violations of the antitrust laws. Section 2 of the Capper-Volstead Act prescribes a procedure whereby the Secretary of Agriculture may institute administrative proceedings and seek enforcement of his orders in the courts if he finds that such an association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced. Obviously, this remedy is applicable in only a limited group of cases and the public is not sufficiently protected against restraints of other kinds. Moreover, an agricultural cooperative is apparently not subject to suit by a private person, as is the case with others whose activities come in conflict with the antitrust laws. Thus, it would seem that under the law as it now stands, an agricultural cooperative may monopolize articles of food and unreasonably restrain commerce in such commodities and the public receives no protection from the antitrust laws except in a very limited way.

The Court is not unmindful of the fact that there may be serious dangers lurking to the public weal in this situation if a cooperative becomes too large or grows too powerful. This possibility was pointed out on the floor of the Senate by the opponents of the Capper-Volstead bill, but without avail. Monopolies and restraints of trade are abhorrent to the genius of Anglo-Saxon jurisprudence and its institutions. Monopolies and unreasonable restraints of trade in the necessities of life such as food are particularly obnoxious.

This subject is obviously within the jurisdiction of the Congress alone. For this Court to construe this Act in any other way than that in which it has been framed by the Congress would be to amend the statute. Courts, however, may not legislate. Sometimes, indeed, there is a strong temptation for a court to do so and there have been occasions in which the temptation has not been overcome, but it must be resisted at all hazards. By bringing this suit the Government may have conferred a benefit on

the public in that it has definitely pointed out a problem for the Congress to solve.

The Court, therefore, reaches the conclusion that the Government has no valid claim for relief under Section 2 of the Sherman Act and, therefore, the first cause of action alleged in the complaint will be dismissed on the merits. This brings us to the second and third causes of action, which relate to the acquisition of the assets of Embassy Dairy as well as the stock of the Richfield Dairy Corporation and of Simpson Brothers, Incorporated. The second cause of action alleges a violation of Sections 1 and 3 of the Sherman Act. It charges a conspiracy with certain persons who are not engaged in agricultural pursuits as defined in the statutes. These allegations are clearly within the exception of the Borden case and, therefore, a cause of action is stated in respect to these activities.

The third cause of action relates to the acquisition of the assets of Embassy Dairy and capital stock of Richfield Dairy Corporation and Simpson Brothers, Incorporated, and charges violations of Section 7 of the Clayton Act, 15 U.S.C.A. § 18, the pertinent portions of which have already been quoted. In brief, the statutory provision here involved prohibits any corporation engaged in interstate commerce to acquire the whole or any part of the capital stock of any other corporation likewise engaged in interstate or foreign commerce, and further prohibits any corporation subject to the jurisdiction of the Federal Trade Commission to acquire the whole or any part of the assets of another corporation engaged in interstate or foreign commerce if the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

The defendant claims that this provision is not applicable to it because the Capper-Volstead Act empowers it to make necessary contracts and agreements to effect its purposes. The Court does not agree with this contention. It is a

well-known principle of law that repeals by implication are not favored, and unless there is a clear repugnancy between an earlier and later statute, the two statutes must be so construed as to give effect to each.

It is the opinion of the Court that the provisions of Section 7 of the Clayton Act, 15 U.S.C.A. § 18, constitute a limitation on the authority of an agricultural cooperative to make contracts as authorized by the Capper-Volstead Act.

The Court has no doubt that the defendant corporation is subject to the jurisdiction of the Federal Trade Commission, 15 U.S.C.A. § 45, and, consequently, within the terms of Section 7 of the Clayton Act.

The Court, therefore, reaches the conclusion that the second and third causes of action averred in the complaint are valid.

In conclusion, the first cause of action will be dismissed on the merits and the trial will proceed only as to the second and third causes of action.

A transcript of this oral decision will constitute the findings of fact and conclusions of law on the aspects of the case that were tried at this hearing.

[Caption Omitted]

Opinion of November 21, 1958

HOLTZOFF, District Judge.

This is a civil action brought by the United States against the Maryland and Virginia Milk Producers Association, Incorporated, under the antitrust laws, for injunctive and similar relief. While the complaint, which relates to the milk industry in the Washington Metropolitan area, is not technically divided into separate counts, it in effect sets forth three separate claims for relief or causes of action. The first cause of action charges an attempt to

monopolize interstate trade and commerce in supplying milk for resale as fluid milk in the Washington Metropolitan area, comprising the District of Columbia and nearby regions of Maryland and Virginia. This cause of action is based on Section 2 of the Sherman Act, 15 U.S.C.A. § 2. The second cause of action charges a combination and conspiracy to eliminate and foreclose the competition above-mentioned by making and carrying out a contract for the transfer to the defendant of substantially all of the assets of a concern known as Embassy Dairy, Incorporated, which is a retail outlet for milk in the area. This cause of action is predicated on Sections 1 and 3 of the Sherman Act, 15 U.S.C.A. §§ 1, 3. The third cause of action which has been the subject matter of the present section of the trial, charges that the defendant on July 26, 1954, acquired substantially all of the assets of Embassy Dairy, Incorporated, and that the effects of this acquisition have been or may be substantially to lessen competition or to tend to create a monopoly in the production and sale of milk to dealers in the Washington Metropolitan area. This cause of action further charges that, with the same effect, the defendant on December 6, 1957, purchased and acquired all of the outstanding capital stock of Richfield Dairy Corporation and Simpson Brothers, Incorporated, which operated the Wakefield Dairy. This cause of action is founded on Section 7 of the Clayton Act, 15 U.S.C.A. § 18. The pertinent provision of that section is found in its first paragraph, and reads as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The defendant is an agricultural cooperative association, having as members nearly two thousand milk producers, that is, persons operating dairy farms at which milk is produced. As an affirmative defense the defendant pleaded that it is immune and exempt from prosecution under the antitrust laws under Section 6 of the Clayton Act, 15 U.S.C.A. § 17, and Section 1 of the Capper-Volstead Act, 7 U.S.C.A. § 291. The Court directed a separate trial of this affirmative defense. The outcome of the separate trial was that the Court, D.C., 167 F. Supp. 45, reached the conclusion that the defense of immunity was valid as to the first cause of action, on the ground that activities of agricultural cooperative associations are expressly exempted by statute from prosecution under the antitrust laws, either in criminal or civil proceedings. The Court further held, however, that this immunity does not extend to contracts or combinations involving, in addition to agricultural cooperatives, any person or concern that is not an agricultural cooperative association and, therefore, not entitled to exemption. On this basis, the Court held that the defense of immunity did not apply to the second and the third causes of action. The Court further held that the Capper-Volstead Act did not exempt agricultural cooperative associations from the provisions of Section 7 of the Clayton Act, to which reference has been made.

After a short recess, the trial was then resumed as to the third cause of action, and has just been concluded. The Court might observe at this juncture that, as a result of the efforts of counsel and the commendable cooperation between them, the various discovery weapons provided by the Federal Rules of Civil Procedure, 28 U.S.C.A., have been used in this litigation to the utmost extent. Requests for admissions numbering 1624 were submitted by the plaintiff and 211 such requests were submitted by the defendant. The great majority of these requests resulted in admissions. Interrogatories were used to a considerable degree and stipulations were made as to authenticity of

documents. In addition, numerous stipulations of facts were entered into, some at a series of pretrial hearings and others outside of the courtroom. The result of this enlightened course of procedure has been that the factual disputes have been reduced to a minimum and the amount of evidence introduced at the trial was greatly diminished in volume, thereby shortening the trial by a considerable extent.

The issues arising out of the third cause of action are now before the Court for decision. Section 7 of the Clayton Act, which has been heretofore quoted, as originally enacted was limited to acquisitions of capital stock. By an amendment enacted on December 29, 1950, the Act was extended so as to cover acquisitions of assets as well. In addition, the amendment generally broadened the phraseology of the statute. In 1950 it became sufficiently comprehensive and inclusive in its terms so as to bring under its ban both horizontal and vertical acquisitions, either of capital stock or of assets of other concerns. In this connection it might be said that by "horizontal" acquisition is meant the acquisition or control of one competitor by another; while the word "vertical" is applied to an acquisition or control by a concern in one echelon, of a concern in another echelon in the same line of trade or commerce, such as a transaction between a manufacturer and a jobber or between a wholesaler and a retailer or between a manufacturer or dealer and a customer.

The statute was construed recently by the Supreme Court in United States v. E. I. duPont de Nemours & Company, 353 U.S. 586, 77 S. Ct. 872, 1 L. Ed. 2d 1057. The facts of that case were unique. In 1917 duPont and Company acquired a considerable block of stock of General Motors Corporation. Obviously, the two corporations were not competitors and were not engaged in the same line of business. DuPont and Company, however, was selling certain commodities, such as fabrics, that were used in the manufacture of automobiles. Among the customers

for these products was General Motors Corporation. The latter purchased some of these products from duPont and some from other manufacturers and dealers. In 1949 the Government brought a civil suit attacking the stock acquisition on the ground that it violated Section 7 of the Clayton Act, in that it tended to lessen competition between duPont and other dealers in similar products, all of whom were selling or endeavoring to sell their goods to General Motors Corporation. The Court held that the transaction violated Section 7 of the Clayton Act.

In discussing the construction to be accorded to the statute, the Court held that it was immaterial whether actual restraints or monopolies in fact resulted from a merger or an absorption condemned by the Clayton Act or in fact whether there was actually a substantial lessening of competition. The Court went even further and held that it was immaterial whether a substantial lessening of competition was intended. The test formulated in the duPont case was whether there was a reasonable probability that a substantial lessening of competition or a monopoly might result from the acquistion by one corporation of the capital stock or the assets of another corporation. On this point the Court said, 353 U.S. at page 589, 77 S. Ct. at page 875:

> "The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended."

In order to be within the ban of the statute, it is, of course, necessary that there be reasonable probability of a lessening of competition or the creation of a monopoly within an area of effective competition. The market affected must be substantial and it must appear that competition may be foreclosed in a substantial share of that market. The Court expressly held that the Act applies both to horizontal and to vertical acquisitions.

So, too, the Court also indicated that the fact that all concerned acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company, and without any design to overreach anyone, does not defeat the right of the Government to relief. Finally, the Court held, for the purposes of the case before it, that the test was whether at the time of the institution of the suit, and not necessarily at the time of the acquisition of the capital stock or assets, there was reasonable probability that the transaction was likely to result in the condemned restraints.

It must be observed that the duPont case was decided by a vote of four to two, with three members of the Court abstaining from participation. A query, therefore, arises whether this decision should be regarded only as *res judicata* as between the parties to it or whether it sets forth binding principles as well on the basis of *stare decisis*. We do not have the views of any five members of the Court on the questions decided in the duPont case.

The biggest bone of contention in that case, however, was whether the legality of the acquisition challenged by the Government may be judged by the situation existing as of the time of the institution of the suit instead of as of the date of the transaction. In the duPont case suit was instituted over thirty years subsequently to the transaction assailed by the Government. In this respect the case, if it should become a binding precedent, introduces a far-reaching innovation and a novel doctrine into the law, since ordinarily the validity of a person's acts or transactions is determined as of the date when they are performed or consummated and when the cause of action arises rather than as of some later time fortuitously or arbitrarily selected by the institution of suit. Fortunately, this is a question that does not concern us in the instant case, since here the Government contends that the challenged transaction was illegal as of its date, as well as of a subsequent time, and the Court is called upon to deter-

mine the issues as of the date of the original transaction and, of course, in the light of subsequent events. Moreover, unlike the suit in the duPont case, in this instance the action was brought within a reasonable time after the challenged transaction. The accused merger took place on July 26, 1954, and the original complaint in this case was filed on November 21, 1956.

Going on to the facts that must govern the disposition of this controversy, the case relates to the Washington Metropolitan area, as has been stated, which consists of the District of Columbia and nearby Maryland and Virginia. This area constitutes a separate market for the retail distribution of milk. The defendant, Maryland and Virginia Milk Producers Association, Incorporated, is a Maryland corporation, having its principal office in the District of Columbia. As has been stated, it is an agricultural cooperative association, having as members nearly two thousand dairy farmers, most of whom are located in Maryland and Virginia. The milk is delivered by the members to the defendant, which acts as the marketing agency for them. Most of the milk is sold eventually to dealers in the Washington Metropolitan area. The defendant also owns a plant at which it transforms surplus milk into various milk products, such as ice cream and powdered milk. The net worth of the defendant corporation is approximately five million dollars.

For the purpose of determining the price to be charged to customers and the price to be paid by the Association to its members, the milk is divided into three categories. So much as is resold to the ultimate consumers in liquid form is placed in Class I; so much as is converted into cream or cottage cheese forms Class II; and the balance, known as surplus milk, which is transformed into other by-products, such as ice cream and powered milk, is denominated Class III. The commodity in Class I and Class II is known in the trade as fluid milk. Different prices are charged to the customer for milk in each of the

three groups, Class I receiving the highest and Class III receiving the lowest price. Since all milk delivered to the Association by its members forms a single pool, figuratively speaking, out of which all sales are made, it is impossible to allocate specific quantities to each of the three classes out of each member's contribution. Accordingly, a so-called "blend" price is ascertained on the basis of the proportions of total sales made by the Association in each class out of the aggregate amount sold during a specified period. The Association then pays its members on the basis of the "blend" price, after deducting a percentage, of course, for its maintenance and operating expenses. Manifestly, the more milk that can be sold in Class I and the less in Class III, the greater will be the "blend" price and the more profitable the returns to the members.

A considerable quantity of milk supplied by defendant to its customer-dealers was resold to the Government for use by personnel at Government establishments within the Washington Metropolitan area, such as military and naval stations, Government hospitals, and other institutions. These sales were made by contracts based on competitive bidding. This aspect of the industry, though minor in proportion, was nevertheless of some importance, as Government purchases in the market amounted to about two million dollars a year.

In the Washington Metropolitan area approximately 86 per cent of all sales of fluid milk to dealers were made by the defendant, and about 45 per cent of sales to Federal establishments were made by dealers who procured their supply from the defendant. There were about a dozen dealers, or dairies as they are sometimes called, in the area. All but four purchased the bulk of their supply of fluid milk from the defendant. Among them were the three largest dairies. Embassy Dairy, Incorported, the fourth largest, was an independent concern and did not buy from the defendant but procured its supply directly

from farmers who, in turn, did not sell to the defendant. Wakefield Dairy, a smaller establishment, followed the same course as Embassy.

Embassy sold to Federal installations over 47 per cent of all Government purchases as against about 45 per cent supplied by dealers who, in turn, purchased from the defendant. Embassy obtained such a large share of the Government business by cutting prices and frequently submitting bids lower than those of defendant's dealer customers. Embassy bought its milk from about 122 independent dairy farmers, as against the almost 2000 farmers who were members of the defendant Association. The purchases of Embassy for resale as fluid milk amounted to about 9.5 per cent of the milk supply reaching the Washington Metropolitan area.

In the spring of 1954 negotiations were initiated between the defendant and Embassy Dairy, Incorporated, for the acquisition of all of the assets of Embassy Dairy by the defendant Association. While the Government is not required to establish the defendant's motive or intent in entering into this transaction, nevertheless, evidence of motive or intent is admissible as it may possibly cast an illuminating light on what actually transpired. Chief Justice Hughes said, in Texas & N. O. Railroad Co. v. Brotherhood of Railway & S. S. Clerks, 281 U.S. 548, 549, 559, 50 S. Ct. 427, 430, 74 L. Ed. 1034, that:

> "Motive is a persuasive interpreter of equivocal conduct."

In memoranda not intended for public consumption but evidently prepared for private circulation among the directors and members of the Association, as well as for submission to a financial institution from which it was desired to borrow money needed to consummate the transaction, the defendant's general manager frankly, candidly, and without guile or equivocation and without attempt at

euphemism, set forth the aims of those who were guiding the destinies of the Association.

In a memorandum dated May 9, 1954, which was introduced in evidence as Plaintiff's Exhibit 22, he said:

> "As of April 1, 1954, 1926 farmers were members of the Association. These 1926 farmers were shipping approximately 208,000 gallons of milk daily, which is better than 90 per cent of the entire Metropolitan Washington milk supply. The average farmer markets in excess of 100 gallons of milk daily."

Again, he said, in the same memorandum:

> "The Association's customers are the large retail dairies in the Washington Metropolitan area. However, from time to time it happens that these dairies do not absorb the entire amount of milk delivered by the members. In this event the Association undertakes to sell this excess in other markets. This excess is a normal incident to the operation of the cooperative, the reason being that in order to be sure of an adequate supply it must maintain an excess over and above past average requirements."

Further, he stated:

> "We believe that the net return to the members is superior to that in any other market, costs of production being taken into consideration."

In the same memorandum he said:

> "The benefits expected from the acquisition of Embassy Dairy are as follows:
>
> "1. Elimination of bootlegging, i.e., bringing in cheap uninspected 'distress' milk from other markets.
>
> "2. The elimination of this 'bootleg' milk will allow our own milk to replace it, to the great increase of the blend price.
>
> I will skip Number 3 as immaterial.
>
> "4. Increase in members estimated at 60 to 70 new producers (now selling to Embassy).

"Embassy Dairy does between 8 and 9 million dollars annual business, which business the Association will get and in large part retain. Assuming, however, it loses some of this business, it will lose it to other local dairies who buy from the Association and so the Association would retain the sale of this milk."

And finally this memorandum makes the following significant statement:

"The purchase of Embassy Dairy will eliminate a disturbing influence which has been a thorn in the side of the Association for many years, which the local Health authorities apparently have been unable to control. Acquisition of Embassy Dairy cannot be other than helpful and profitable to the Association."

A memorandum dated June 2, 1954, also prepared by the general manager of the defendant, which has been introduced in evidence as Plaintiff's Exhibit 21, contained somewhat similar statements. The pertinent portions read as follows:

"The Embassy Dairy has for the past 15 years been the major factor involved in the attempts to weaken and destroy the Milk Act of 1925 [D.C. Code 1951, § 33-301 et seq.]."

After making some statements that are here immaterial, the writer goes on as follows:

"In addition to being the leader in the attempts to circumvent and modify the Milk Act and the accompanying regulations, the dairy, through its ability to buy cheap milk both from unlicensed sources and from independent Washington producers, has cut into the market structure to the extent that they have taken considerable sales away from dealers buying milk through the Association.

"As the result of their ability to under-buy the market and thus take away business from dealers purchasing their milk through the Asociation they have, as a result, reduced the Association's Class I sales and

therefore caused additional surplus to the members of this Association. We estimate that this has amounted to about $700,000 a year loss in revenue to Association producers.

"The effect upon the producer milk checks has not been limited to this loss of sales, but extends to even a greater amount to the contract milk bidding. There is approximately 14,000 gallons of contract milk a day in this Metropolitan market. This milk would normally be classified as Class I and be sold to the distributors at the Class I price. As the result of the dairy's ability to under-buy, therefore under-cut in their bidding, it has been necessary for the Association to drop the contract price to a competitive level, that is, to the price that Embassy is able to buy their milk."

And again the writer says:

"By acquiring this dairy the Association can immediately pick up approximately 8,000 gallons of milk sales for its members for which the dairy has been buying the milk from other than licensed producers on the market."

About six months after the transaction was consummated, the Secretary-Treasurer of the Association expressed similar sentiments in a letter that he wrote to an officer of a similar association in Detroit, Michigan. This letter, dated February 8, 1955, which was introduced in evidence as Plaintiff's Exhibit 48, contains the following statement:

"The first plant we 'inherited' in 1940 was a small one that we had to take over as the result of bankruptcy. The second one which we have just taken over as of August 1, 1954, was one that we felt we had to buy for self protection; the former owners of which had repeated their activities once executed in the Chicago market and since 1930 in the Washington market to the extent that from our standpoint everyone in the distributing field would be happy to have them out of the market. It did give us an additional outlet for a sizable amount of milk which we did not have under prior conditions inasmuch as they were buying independent milk."

The negotiations between the defendant and Embassy Dairy, Incorporated, culminated on July 26, 1954, by a conveyance of the assets of Embassy to the Association, including all of its tangible property, both real and personal, as well as intangible assets. The Embassy Dairy then immediately went out of business. The evidence indicates that the price paid by the Association for the transfer was far in excess of the actual intrinsic value of the property purchased. To be sure, the rosy prospects previously depicted did not materialize and the optimistic expectations of those in control of the Association were not fully realized. Nevertheless, they were at least partially attained. Apparently the continued existence of several comparatively small dairies kept alive considerable competition in the industry.

After the absorption of Embassy by the defendant, the latter undertook the retail business previously conducted by Embassy, in addition to continuing the functions of the Association as a wholesaler. Many of the independent producers who had supplied Embassy were unable to find an outlet for their product in the Washington market unless they were willing to surrender their independent status and join the Association. Some of them, indeed, pursued the latter course, thereby augmenting the defendant's membership. A large proportion of them, however, began to ship to a Baltimore dealer. Thus, one result of the transaction was that a portion of the fluid milk supply was diverted from the Washington to the Baltimore market, while another consequence was an increase in the amount of milk coming into the defendant's hands.

A still further sequel of the transaction was the elimination of the largest single outlet in the Washington Metropolitan area for milk produced by independent producers. Immediately after the Embassy acquisition 91.7 per cent of the milk purchased by the Federal government originated directly or indirectly from the defendant, as against 45 per cent that it had indirectly supplied previously.

The Embassy Dairy was eliminated completely as a factor from this competitive business.

Thus, the result of the acquisition of Embassy by defendant tended to lessen competition in the milk industry in the Washington market in more ways than one. It diminished competition for the purchase of milk from producers by eliminating one large independent purchaser; it reduced competition for sales to Government establishments by excluding a rival that had been in the habit of cutting prices and under-bidding dealers who bought from the Association, and it tended to create a monopoly by concentrating a larger proportion of the milk supply reaching the Washington area in the hands of the defendant, thereby augmenting the defendant's control or, at least, influence on the market.

It must, indeed, be observed that defendant did not achieve a complete monopoly, for several comparatively small independent dealers still stayed in the market and even prospered. The law, however, is not aimed only at complete monopolies or directed solely at entire elimination of all competition. It is sufficient if the acquisition, merger, or absorption tends to lessen competition or tends to create a monopoly. The conclusion is inescapable that the transaction challenged by the Government in respect to the Embassy Dairy led to each of these consequences. Without doubt, the result was that the defendant enhanced its dominating position in the market, even though it did not attain complete control.

It is argued by able counsel for the defendant that the acquisition of Embassy by the defendant did not reduce the number of dealers in the market but merely resulted in the substitution of another dealer for the one who had been eliminated, in that the business previously conducted by Embassy was taken over and continued to be operated by the defendant, in addition to the defendant's business as a wholesale distributor. Ingenious as this line of reason-

ing is, it does not solve the problem. The transaction constituted much more than the replacement of one dealer by another. It was the absorption of the business of the largest independent dealer by the biggest wholesaler in the area and combining the affairs of the two concerns into a single operation, thereby augmenting the influence of the latter in the market and getting rid of a troublesome rival.

So, too, it is no answer to say that milk prices in the area did not climb to a higher level subsequently to the transaction. Prices are affected and influenced by numerous imponderable factors. It is within the realm of possibility that prices might have fallen were it not for the acquisition of Embassy by the Association. The subject of price fluctuations is a topic concerning which the Court cannot speculate.

As an affirmative defense the defendant invokes the last paragraph of Section 7 of the Clayton Act, which reads as follows:

> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79 of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board."

Stripping this provision of those portions that are not material to the issues in the case at bar, the pertinent language is reduced to the following:

> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Agriculture under any statutory provision vesting such power in such Secretary."

In support of this defense, defendant introduced evidence to the effect that it applied to a Government financial institution, known as the Baltimore Bank for Cooperatives, for a loan to enable it to carry out the purchase of the Embassy assets and that after scrutinizing the merits of the proposed transaction the Bank made the loan requested by the defendant. The defendant further introduced evidence to the effect that the Marketing Division of the Farmer Cooperative Service of the Department of Agriculture looked into the desirability of the transaction and expressed a favorable opinion.

This evidence does not sustain the defense, for two reasons. First, the statute above quoted exempts only such transactions as are consummated pursuant to authority given by the Secretary of Agriculture "under any statutory provision vesting such power in such * * * Secretary". Admittedly, however, there is no statutory provision empowering the Secretary of Agriculture to approve any transaction such as is involved here. Second, the transaction was not authorized either by the Secretary of Agriculture or by anyone acting in his behalf. The acts and statements of Government officials on which the defendant relies are not sufficient to constitute statutory sanction. Even if they should be deemed to be such representations as might form a basis for an estoppel as between private individuals, this circumstance cannot aid the defendant. It is elementary law that the Government cannot be estopped by statements or acts of any of its officers or agents. Authorities supporting this principle and applying it are legion. Suffice it to cite two old decisions of the Supreme Court from which the later authorities are derived and on which they are based, In re Floyd Acceptances, 7 Wall. 666, 676, 19 L. Ed. 169; and Wisconsin Central Railroad Co. v. United States, 164 U.S. 190, 210, 17 S. Ct. 45, 41 L. Ed. 399.

The Court, therefore, concludes that the acquisition of the assets of Embassy Dairy, Incorporated, by the defend-

ant, constituted a violation of Section 7 of the Clayton Act and that, consequently, judgment should be rendered compelling the defendant to divest itself of these assets and cancelling all contracts ancillary to the transaction.

A different problem arises in connection with the acquisition of the capital stock of the Richfield-Wakefield Dairies. There are two concerns involved, one known as Richfield, the other one Wakefield. At the time in question, the Richfield Corporation was out of business, but owned and controlled the stock of Wakefield Corporation, or rather Simpson Brothers, Incorporated, which operated the Wakefield Dairy. The evidence establishes without contradiction that at the time when the capital stock of these two corporations was purchased by the defendant the two companies were hopelessly insolvent and were deeply in debt. The defendant was a very large creditor, for an amount exceeding $300,000, for unpaid milk bills. The Wakefield Dairy was in fact on the brink of bankruptcy.

The acquisition of capital stock or assets of a failing corporation is not within the ban of Section 7 of the Clayton Act. While the statute does not expressly so provide, this conclusion is inherent in the statutory provision because the acquisition of a failing corporation that is on the verge of going out of business cannot result in lessening competition or in creating a monopoly. Be that as it may, the Supreme Court so held in International Shoe Co. v. Federal Trade Commission, 280 U.S. 291, 298, 50 S. Ct. 89, 74 L. Ed. 431.

The Court concludes, therefore, that the acquisition of the capital stock of the Richfield Dairy Company and Simpson Brothers, Incorporated, was not violative of Section 7 of the Clayton Act.

This opinion will constitute the findings of fact and conclusions of law.

Judgment will be rendered adjudging the acquisition by the defendant of the capital stock of Richfield Dairy

Company and Simpson Brothers, Incorporated, to be valid; and further adjudging the acquisition by the defendant of the assets of Embassy Dairy, Incorporated, and the contracts ancillary thereto, to be invalid as in violation of Section 7 of the Clayton Act. The judgment will require the defendant to divest itself within a reasonable time of all assets acquired from Embassy Dairy, Incorporated, and will direct the cancellation of all contracts ancillary to the acquisition. The judgment will further direct the defendant to file a report within sixty days and at such other times as the Court may order, setting forth what steps are being taken to carry out this judgment. The judgment will also provide that applications may be made at the foot of the decree.

Counsel will submit a proposed judgment.

[Caption Omitted]

Opinion of January 14, 1959

The Court: As has been heretofore indicated, the complaint in this civil action brought by the United States against the Maryland and Virginia Milk Producers Association, Inc., under the antitrust laws, is in effect divided into three separate claims for relief or causes of action.

At the first section of the trial, the Court upheld the defense of immunity to the first cause of action, in that the Defendant, being an agricultural cooperative, was immune from the anti-trust laws unless and except when it entered into transactions with persons or organizations that themselves did not possess such immunity, that is, were not agricultural cooperatives.

The trial then proceeded as to the third cause of action, which was predicated on the Clayton Act. That section of the trial concluded with a decision in favor of the Gov-

ernment to the effect that the transaction involving the acquisition by the Defendant of Embassy Dairy, Inc. was a violation of Section 7 of the Clayton Act, and with a decision in favor of the Defendant in respect to similar acquisition of Richfield and Wakefield Dairies.

The Government then requested that the Court proceed to a decision under the second cause of action, which also attacked the Embassy Dairy transaction, but based the attack on the Sherman Act, instead of on the Clayton Act.

It was stipulated that the case, in so far as this cause of action was concerned, would be submitted on the same record as that before the Court at the trial on the first and third causes of action.

The Court, therefore, readopts the findings of fact that it has heretofore made.

In addition to that, it is going to make a few additional findings, largely of the nature of ultimate findings based upon the evidentiary findings heretofore made.

First, the Court finds as a fact that the result of the transaction complained of was a foreclosure of competition, in respect to Government contracts and in respect to purchases of milk from milk producers.

The Court further finds as a fact that the transaction complained of was entered into with the intent and purpose of restraining trade.

In the light of the decision of the Supreme Court in United States v. Griffith, 334 U.S. 100, 105, the Court does not regard it as necessary to find a specific intent to restrain trade in order to reach the conclusion of law that the antitrust laws have been violated. Nevertheless, the Court does make hereby such a finding of fact.

The Court further concludes that an unreasonable restraint of trade, violative of the Sherman Act, has resulted from the acquisition of Embassy Dairy by the Defendant.

It has been urged in behalf of the Defendant that the transaction involved in this case is within the immunity accorded to agricultural cooperatives. The basis of this argument is that the doctrine which bans immunity in respect to transactions entered into between agricultural cooperatives and organizations that are not such cooperatives should be limited to such transactions as result in a competitive advantage to the other party to the transaction, that is, the party which is not clothed with the immunity.

The Court does not find any authoritative basis for such a distinction. The general doctrine limiting the immunity in the manner heretofore stated was formulated and enunciated by the Supreme Court in United States v. Borden Company, 308 U.S. 188, 204.

There is nothing in that case intimating that any such limitation as is now suggested should exist. This Court finds no authoritative or binding expression formulating such a qualification.

True, some expressions are cited from a number of District Court cases involving transactions of labor unions which tend to support the reasoning advanced on behalf of the Defendant in this respect.

Entirely aside from the fact that those expressions are not binding on this Court, it must be noted that the decisions involving labor union transactions are governed by a somewhat different principle than those which apply to agricultural cooperatives.

To be sure, the same provision of law grants an immunity from the antitrust laws to agricultural cooperatives as to labor unions; but in addition to that, other statutes, such as the Norris-La Guardia Act, and the National Labor Relations Act, the Labor-Management Act, add certain additional privileges to labor unions that are not accorded to agricultural cooperatives. It necessarily follows, therefore, that decisions involving labor unions are not nec-

essarily apposite as to this point when an agricultural cooperative is involved.

In this connection, it is appropriate to call attention to the decisions of the Supreme Court in United States v. Hutcheson, 312 U.S. 219, and in Allen Bradley Company v. Local Union No. 3, 325 U.S. 797, 806, in which it was held expressly that:

> "The Sherman Act, the Clayton Act and the Norris-La Guardia Act must be jointly considered in arriving at a conclusion as to whether labor union activities run counter to the antitrust legislation."

Naturally, an agricultural cooperative can derive no benefit from the statutes relating to labor unions.

The Court, therefore, reaches the conclusion that the statutory immunity accorded to agricultural cooperatives does not apply to the transaction here involved.

In respect to the main issue here presented for decision, it has been held by the Supreme Court that it is unreasonable per se to foreclose competitors from any substantial market. International Salt Company v. United States, 332 U.S. 392, 396; United States v. Griffith, 334 U.S. 100, 107.

In addition, the case of United States v. Yellow Cab Company, 332 U.S. 218, generally supports the conclusion that is being reached here.

The Court concludes that the transaction involving the acquisition of Embassy Dairy by the Defendant constitutes a violation of Section 3 of the Sherman Act.

This oral opinion will constitute the findings of fact and conclusions of law. Counsel will prepare a judgment in accordance with the ruling and in the form indicated in the opinion rendered in this case on November 21, 1958.

[Caption Omitted]

Judgment

This cause coming on to be heard upon defendant's third, fourth, fifth and sixth affirmative defenses as to which the Court ordered a separate trial under the provisions of Rule 42(b) FRCP, and defendant having withdrawn its sixth affirmative defense, it is this 10th day of November, 1958

ADJUDGED, ORDERED AND DECREED, That the third (*Capper-Volstead Act* § 1) and fifth (*Clayton Act* § 6) affirmative defenses be and they are hereby severally sustained as to the cause of action pleaded in Paragraphs 21, 22 and 23 of the last amended complaint, and the said cause of action is hereby dismissed, with prejudice.

The Court adopts as its findings of fact and conclusions of law its Opinion filed herein October 16, 1958.

By the Court

/s/ ALEXANDER HOLTZOFF
Judge

[Caption Omitted]

Final Judgment

This Court having conducted a separate trial as to plaintiff's causes of action stated in Paragraphs 29 and 29A of the Complaint as amended and having rendered its opinion thereon dated November 21, 1958; and having conducted a further separate trial as to plaintiff's causes of action stated in Paragraphs 24 to 28, inclusive, of the Complaint as amended and having rendered its opinion thereon dated January 14, 1959; and each of said opinions containing the Court's Findings of Fact and Conclusions of Law, it is this 22nd day of January 1959, hereby

ADJUDGED, ORDERED AND DECREED THAT:

1. The acquisition by defendant of certain assets of Embassy Dairy, Inc. on or about July 26, 1954, and the contracts ancillary thereto, were and are in violation of Section 7 of the Clayton Act (15 U.S.C. § 18).

2. The acquisition by defendant of the capital stock of Richfield Dairy Corporation, and Simpson Bros., Inc., trading as Wakefield-Model Farms Dairy, was not and is not in violation of Section 7 of the Clayton Act and the cause of action relating thereto is dismissed with prejudice.

3. The contract of May 26, 1954, pursuant to which defendant acquired certain assets of Embassy Dairy, Inc., and the ancillary contracts were and are in violation of Section 3 of the Sherman Act (15 U.S.C. § 3).

4. Within one (1) year from the date hereof the defendant shall dispose of as a unit and as a going dairy business all assets of Embassy Dairy, Inc., tangible and intangible, which it acquired on July 26, 1954, and replacements therefor.

5. The divestiture herein ordered shall be in good faith and shall require the prior approval of this Court on notice to counsel for plaintiff. Within sixty (60) days from the date hereof the defendant shall report to the Court its efforts to carry into effect the divestiture herein ordered. Further reports shall be made to this Court every ninety (90) days thereafter and on such other dates as this Court may order.

6. Pending divestiture, defendant shall administer the assets acquired from Embassy Dairy, Inc., and replacements therefor, in good faith as a going dairy business with a view to preserving the said assets in as good condition as possible, ordinary wear and tear excepted. For legitimate business purposes, present assets may be replaced by other assets of substantially equal value. If deemed advisable

in the operation in good faith of the said dairy business, capital improvements may be made. The sale of any capital asset of a value in excess of $10,000 shall require the prior approval of the Court.

7. So much of the contracts by and between defendant and Embassy Dairy, Inc., Green Spring Dairy, Inc., Green Spring Milk Company, Homestead Dairy Products Company, James J. Ward, James J. Ward, Jr., John Ward and R. Jeanne Ward, respectively, made on or about May 26, 1954, as provide that for a period of ten years the aforementioned persons will not engage in the sale or distribution of milk, cream or other dairy products in an area consisting of the District of Columbia and adjacent parts of the States of Maryland and Virginia, are hereby declared invalid and defendant is enjoined and restrained from enforcing or claiming any rights under such provisions.

8. Jurisdiction of the causes of action stated in Paragraph 29 and Paragraphs 24 to 28, inclusive, of the Complaint as amended is retained for the purpose of enabling either of the parties to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, and for the enforcement of compliance therewith and punishment of violations thereof.

9. Neither party shall be allowed costs.

/s/ Alexander Holtzoff
Alexander Holtzoff
United States District Judge

[Caption Omitted]

Order

Upon motion of the plaintiff, the Court being fully advised in the premises, it is this 30th day of January, 1959, hereby

ORDERED that the claims for relief under Section 1 of the Sherman Act, 15 U.S.C. § 1, pleaded in Paragraphs 24, 25, 26, 27, and 28 of the complaint herein, as amended, be and they hereby are dismissed.

/s/ ALEXANDER HOLTZOFF
Alexander Holtzoff
United States District Judge

STATUTES INVOLVED

1. The Sherman Act: Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. §§ 1, 2, 3 and 4).

Section 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5 as amended and Supplemented, of the act entitled "an act to create a Federal Trade Commission to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further,* That the preceding pro-

viso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 3:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on

conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4:

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

2. The Clayton Act: Act of October 15, 1914, 38 Stat. 730, as amended.

Section 6 (15 U.S.C. § 17):

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 7, as amended, 64 Stat. 1125 (15 U.S.C. § 18):

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or

short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Section 15 (15 U.S.C.A. § 25):

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations

of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and supoenas to that end may be served in any district by the marshal thereof.

3. The Capper-Volstead Act: Act of February 18, 1922, 42 Stat. 388 (7 U.S.C. §§ 291, 292).

Section 1:

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

Section 2:

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association to cease and desist from monopolization or retraint of trade. On the request of such association or if such asso-

ciation fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to the pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

NOS. –

UNITED STATES OF AMERICA, APPELLANT

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The three opinions of the district court are reported in 167 F. Supp. 45, 167 F. Supp. 799, and 168 F. Supp. 880, and are set forth in the appendix (1a–34a) of the appellant's jurisdictional statement in *Maryland and Virginia Milk Producers Assn.* v. *United States,* No. 898, this Term. This appendix, which we incorporate by reference, will be referred to as App. No. 898.

JURISDICTION

The United States brought this action under Section 4 of the Sherman Act, 15 U.S.C. 4, and Section

15 of the Clayton Act, 15 U.S.C. 25, to prevent and restrain violation of Sections 1, 2, and 3 of the Sherman Act, and Section 7 of the Clayton Act. The district court entered partial judgments on November 10, 1958, January 22, 1959, and January 30, 1959 (App. No. 898, 35a–38a), all of which became final on the latter date (Rule 54(b), F.R. Civ. P.)

On January 9, 1959, the United States filed a notice of appeal from the judgment entered on November 10, 1958.[1] On March 23, 1959, it filed a notice of appeal from the same judgment and also from the judgment entered on January 22, 1959. The former notice of appeal was filed as a precaution against the possible finality of the November 10, 1958, judgment.

The jurisdiction of this Court to review by direct appeal the judgments entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Yellow Cab Co.*, 332 U.S. 218; *United States* v. *Radio Corporation of America*, 358 U.S. 334.

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[1] By an order entered by the district court on February 17, 1959, the time for docketing the case and filing the record with the Supreme Court pursuant to the notice of appeal filed on January 9, 1959, was extended from March 10, 1959, to and including May 22, 1959.

STATUTES INVOLVED

Sections 1, 2, 3, and 4 of the Sherman Act, Sections 6, 7, and 15 of the Clayton Act, and the Capper-Volstead Act, are set forth in App. No. 898, pp. 38a–45a.

QUESTIONS PRESENTED

1. Whether the Capper-Volstead Act and Section 6 of the Clayton Act confer upon an agricultural cooperative immunity from the prohibitions in Section 2 of the Sherman Act against monopolizing and attempting to monopolize.

2. Whether the district court, after finding that defendant's acquisition of Embassy Dairy was in violation of Section 7 of the Clayton Act and Section 3 of the Sherman Act, erroneously failed to provide adequate relief in:

(a) Refusing to order defendant to divest all assets used in operating Embassy Dairy as a going concern as of the date of divestment.

(b) Refusing to prohibit defendant from operating a dairy other than Embassy pending divestiture and for a reasonable period thereafter.

(c) Refusing to forbid for a reasonable period the acquisition by defendant of any new dairy unless defendant shows that such an acquisition would not substantially lessen competition or tend toward monopoly.

(d) Denying the Government visitation rights for the purpose of securing defendant's compliance with the court's judgment.

STATEMENT

The defendant is an agricultural cooperative association of nearly 2,000 milk producers supplying 86% of the fluid milk sold in the metropolitan Washington area (App. No. 898, p. 21a). Milk is delivered by each member to the association, which acts as a marketing agency selling to dealers, or dairies, for resale to the public. On July 26, 1954, the defendant acquired substantially all of the assets of Embassy Dairy, Inc., the fourth largest local milk dealer.

On November 21, 1956, the United States filed a civil antitrust action charging:

(1) That beginning in or about the year 1930, the defendant had attempted to monopolize, and had monopolized, by predatory and exclusionary conduct, trade and commerce in the supplying of raw milk to dealers in the Washington metropolitan area, in violation of Section 2 of the Sherman Act;

(2) That the defendant's acquisition of the Embassy assets had, and might have, the effect of substantially lessening competition or tending to create a monopoly in the production and sale of raw milk to, and the distribution and sale of pasteurized fluid milk by, Washington metropolitan area dealers, in violation of Section 7 of the Clayton Act;[2] and

(3) That the contracts under which the defendant acquired the Embassy assets were made, pursuant to

---

[2] The defendant's acquisition of the so-called Richfield-Wakefield Dairy on December 6, 1957, was also challenged under Section 7, but was held to be legal under the "failing corporation" doctrine. *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291. No appeal is taken from this holding.

an unlawful conspiracy, for the purpose of eliminating Embassy as an outlet for raw milk produced by others, and to eliminate competition between Embassy and dealers purchasing raw milk from the defendant, in unreasonable restraint of trade and commerce in the Washington metropolitan area in violation of Sections 1 and 3 of the Sherman Act.

The defendant denied the alleged violations and claimed, as an affirmative defense, that its activities were exempt from prosecution under the antitrust laws by virtue of Section 6 of the Clayton Act and the Capper-Volstead Act. On October 16, 1958, after a separate trial of this asserted immunity, the court ruled that the defendant qualified as an agricultural organization under Section 6 of the Clayton Act and the Capper-Volstead Act, and that under these statutory provisions it is exempt from the provisions of the antitrust laws "provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities" (App. No. 898, 11a). The court further ruled that the monopolization charges under Section 2 of the Sherman Act were barred by this exemption, but that the charges of violating Sections 1 and 3 of the Sherman Act and Section 7 of the Clayton Act were not (*id.*, 13a–14a).

The court accordingly, by its judgment of November 10, 1958, dismissed the monopolization charges (*id.*, 35a).

Prior to the entry of this judgment, the court proceeded with trial of the charge of violation of Section 7 of the Clayton Act. At the conclusion of trial of this issue the court rendered an opinion on November 21,

1958, holding that the defendant's acquisition of Embassy violated Section 7 of the Clayton Act (*id.*, 14a–31a). The parties stipulated that the Sherman Act charges should be determined on the record of the prior hearings, and the court by its opinion of January 14, 1959, held that the transaction involving the defendant's acquisition of Embassy violated Section 3 of the Sherman Act (*id.*, 31a–34a).

The judgment entered on January 22, 1959, adjudged that the defendant had violated both Section 7 of the Clayton Act and Section 3 of the Sherman Act (*id.*, 36a). The judgment entered on January 30, 1959, dismissed the claims for relief under Section 1 of the Sherman Act (*id.*, 37a–38a).

The judgment of January 22, 1959, ordered the defendant, within one year, to divest itself "as a unit and as a going dairy business all assets of Embassy Dairy, Inc., tangible and intangible, which it acquired on July 26, 1954, and replacements therefor" (*id.*, 36a). Pending divestiture, the defendant was ordered to administer the Embassy assets and the replacements therefor "in good faith as a going dairy business with a view to preserving the said assets in as good condition as possible, ordinary wear and tear excepted" (*ibid.*). The judgment also cancelled contracts between the defendant and the former owners of Embassy whereby the latter agreed not to engage in the sale or distribution of dairy products in the Washington metropolitan area for a period of ten years (*id.*, 37a).

In fashioning its decree, the court refused the Government's request that the defendant be required to

divest all assets used in operating Embassy as a going concern as of the date of divestment; that the defendant be prohibited from operating a dairy other than Embassy pending divestiture and for a reasonable period thereafter; and that the Government be granted visitation rights to enforce the decree. The court also rejected, without hearing argument, the Government's proposal that the defendant be prohibited for a reasonable period from acquiring any new dairy unless it shows that such an acquisition would not substantially lessen competition or tend toward monopoly.

The United States appeals from the dismissal of its action under Section 2 of the Sherman Act. It also appeals upon the ground that the court's judgment of January 22, 1959, fails to give adequate relief with respect to the defendant's violation of Section 3 of the Sherman Act and Section 7 of the Clayton Act. The defendant has appealed (No. 898, this Term) from the holding and judgment that its acquisition of Embassy violated Section 7 of the Clayton Act and Section 3 of the Sherman Act.

THE QUESTIONS ARE SUBSTANTIAL

1. Section 6 of the Clayton Act provides that the antitrust laws shall not be construed to forbid the "existence and operation" of agricultural cooperatives, or to forbid such organizations from "lawfully carrying out the legitimate objects thereof"; nor shall such organizations or its members be held to be "illegal combinations or conspiracies in restraint of trade, under the antitrust laws." Section 1 of the Capper-Volstead Act provides that persons engaged

in the production of agricultural products may act together in associations in "collectively * * * handling and marketing" such products in interstate commerce; and that such association may have "marketing agencies in common" and may make "the necessary contracts and agreements to effect such purposes". Section 2 of the Act provides that the Secretary of Agriculture, if he believes that such an association "monopolizes or restrains" interstate trade "to such an extent that the price of any agricultural product is unduly enhanced", shall file a complaint and if he finds, after a hearing, such undue enhancement of prices he shall issue a cease and desist order which is enforcible through district court proceedings under the charge of the Attorney General.

United States v. *Borden Co.*, 308 U.S. 188, held that an agricultural cooperative which had conspired with distributors of milk, a labor union, municipal officials, and others to fix prices and control supply was not within the exemptions of Section 6 of the Clayton Act or Section 1 of the Capper-Volstead Act.[3] The Court also held that Congress did not intend the proceeding by the Secretary of Agriculture authorized by Section 2 of the Capper-Volstead Act to be "a substitute for the provisions of the Sherman Act", or to bar a Sherman Act action against a conspiracy of the kind there involved absent a proceeding by the Secretary. 308 U.S. at 206. The

[3] For holdings as to the limits of the immunity given labor organizations by Section 6 of the Clayton Act, see *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797; *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 400.

Court, in reaching the conclusion that authorization of the administrative proceeding was not to be deemed an occupancy of the entire field of restraint and monopolization with respect to agricultural cooperatives, pointed out that the Capper-Volstead Act gave no express immunity from the Sherman Act and that, unlike the Sherman Act, it did not cover attempts to monopolize or provide penalties for past violation.

We do not contend that the *Borden* decision is fully determinative of the issue presented here—whether the Clayton Act and the Capper-Volstead Act confer upon an agricultural cooperative, not acting in combination or conspiracy with outsiders, absolute immunity to monopolize and to attempt to monopolize trade in an agricultural product. We assume also that the immunity conferred embraces a cooperative which, solely by reason of the voluntary membership of all local producers and without using any coercive or anti-competitive means, obtains a monopoly of marketing their output. Moreover, it is also assumed that a cooperative may sell at whatever price it chooses without transcending its immunity (subject to a proceeding by the Secretary of Agriculture if prices are thereby "unduly enhanced").

But these assumptions as to the scope of the immunity do not determine whether the Government's charge under Section 2 of the Sherman Act states a valid cause of action. Aside from the fact that the defendant controlled 86% of all fluid milk sold to dealers in the Washington Metropolitan area (App. No. 898, 21a), the complaint alleged that the defendant's monopolization and attempts to monopolize

had been effectuated by coercive, exclusionary, and anti-competitive means. Following the charge of monopolization and attempted monopolization in paragraph 21 of the amended complaint, paragraph 22 alleged in part:

> In effectuating the offenses hereinbefore charged, the defendant has, among other things:
>
> * * * * *
>
> b. Excluded, eliminated, and attempted to eliminate others, including producers and producers' agricultural cooperative associations not affiliated with defendant, from supplying milk to dealers.
>
> c. Effected agreements with suppliers of milk, including agricultural cooperative associations, to eliminate competition between said suppliers and the defendant or to regulate the terms or conditions under which said suppliers would compete with defendant.
>
> d. Acquired and attempted to acquire dealer and manufacturing outlets by threats, inducements and other diverse means.
>
> e. Threatened and undertaken diverse actions to induce or compel dealers to purchase milk from the defendant, and induced and assisted others to acquire dealer outlets purchasing milk from producers not affiliated with the defendant.
>
> * * * * *
>
> g. Threatened and engaged in predatory pricing.
>
> * * * * *
>
> k. Eliminated and attempted to eliminate competition with its dealer-customers by deal-

ers purchasing milk from others than the defendant.

Section 6 of the Clayton Act, in its application to agricultural cooperatives, had as its primary purpose granting farmers freedom to act as a unit in marketing their products. This authorization permits them to pool crops, agree upon sales price, establish common processing and marketing agencies, and enter into sales contracts with outsiders. But *Borden* establishes that no blanket immunity from the antitrust laws is conferred, and the Court's opinion and reasoning do not suggest that combination with outsiders is the only circumstance under which a cooperative may transcend this immunity. The Government's appeal thus presents an issue not heretofore considered by this Court—whether the immunity embraces monopolization achieved by coercive or exclusionary means involving restraints of trade of a kind ordinarily cognizable under Section 1 of the Sherman Act. The issue whether a cooperative retains its immunity when it utilizes monopoly power, even if—unlike here—lawfully acquired, "to foreclose competition, to gain a competitive advantage, or to destroy a competitor" (cf., *United States* v. *Griffith*, 334 U.S. 100, 107), presents a question of law of large public importance meriting determination by this Court. Here, as in *Allen Bradley, supra*, there are "two declared congressional policies which it is [the Court's] responsibility to try to reconcile", and to determine "how far Congress intended activities under one of these policies to neutralize the results envisioned by the other." 325 U.S. at 806.

Other lower federal courts have not construed the general language of the Clayton Act and Capper-Volstead Act as creating "so great a breach in historic remedies and sanctions" (*Borden* case, *supra*, 308 U.S. at 198) as would follow from the decision below in the instant case. *United States* v. *King*, 250 Fed. 908 (D. Mass.), held that a secondary boycott of "blacklisted" potato dealers was not a lawful means of carrying out the legitimate objects of a potato growers' association and was therefore not immune to prosecution under the Sherman Act. In *Gulf Coast Shrimpers & Oyster Ass'n* v. *United States*, 236 F. 2d 658, 665 (C.A. 5), certiorari denied, 352 U.S. 927, the court held a fishermen's association exceeded any privilege or exemption granted by the Fishermen's Collective Marketing Act[4] when it undertook not simply to fix the prices demanded by its members, but to exclude from the market all persons not buying and selling in accordance with its fixed prices. See also *Local 36 of International Fishermen, etc.* v. *United States*, 177 F. 2d 320, 332 (C.A. 9); *Manaka* v. *Monterey Sardine Industries, Inc.*, 41 F. Supp. 531 (N.D. Cal.). In *April* v. *National Cranberry Ass'n*, 168 F. Supp. 919, 923 (D. Mass.), the court expressly disagreed with the conclusion of the district court in the instant case that agricultural cooperatives are entirely exempt from the prohibitions of Section 2

[4] 15 U.S.C. 521. The language used in outlining the exemption is substantially identical with that in Section 1 of the Capper-Volstead Act.

of the Sherman Act,[5] and held that the Clayton and Capper-Volstead Act "did not make lawful purely predatory practices seeking to monopolize, forbidden to an individual corporation * * *." Accord, *Cape Cod Food Products* v. *National Cranberry Ass'n*, 119 F. Supp. 900, 907 (D. Mass.).

2. The power of this Court to examine the relief granted by the district court in a Sherman Act proceeding and to order any modification deemed necessary or appropriate in order to protect the public interest is clear. *Hartford-Empire Co.* v. *United States*, 324 U.S. 570, 571. "The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus bypassing the usual appellate review, has always had the most careful scrutiny of this Court." *International Boxing Club* v. *United States*, 358 U.S. 242, 253. And see *Standard Oil Co.* v. *United States*, 221 U.S. 1, 78–82; *United States* v. *American Tobacco Co.*, 221 U.S. 106, 184–188; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185. The test is whether or not the required relief reasonably tends to dissipate the restraints and prevent evasions. *United States* v.

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[5] The court relied in part on the following statement in the report of the House Judiciary Committee on the Capper-Volstead Act (H. Rep. No. 24, 67th Cong., 1st Sess., p. 3): "In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them."

Bausch & Lomb Co., 321 U.S. 707, 726. And the purpose of a decree in a case of the type of this one is to "effectively pry open to competition a market that has been closed by defendants' illegal restraints." *International Salt Co.* v. *United States*, 332 U.S. 392, 400–401.

The district court, having held that the defendant's acquisition of Embassy's assets violated Section 7 of the Clayton Act and Section 3 of the Sherman Act, ordered a divestiture. The judgment requires the defendant, within a year, to "dispose of as a unit and as a going dairy business all [Embassy] assets * * * tangible and intangible, which it acquired on July 26, 1954, and replacements therefor", and requires the defendant, pending divestiture, to administer these assets in "good faith" so as to preserve them in as good condition as possible (App. No. 898, 36a). We submit that in several respects the judgment fails to provide sufficient safeguards to insure a divestiture which will result in establishment of an effectively competing independent dairy.

(a) The judgment should be modified so as to require the defendant to divest all assets used, as of the date of disposition, in the dairy business conducted under the trade name "Embassy Dairy". The assets presently so used include those acquired from Embassy in 1954, new equipment purchased by the defendant, and assets which it acquired in 1957 from the Richfield-Wakefield Dairy. The district court refused to determine in the decree, and postponed for future decision, whether the assets acquired from Richfield-Wakefield and as a result of improvements are

exempt from divestiture, or whether they are encompassed by the requirement that Embassy be sold "as a going dairy business". As this Court stated in *International Salt Co.* v. *United States,* 332 U.S. 392, 400, "it is desirable, in the interests of the court and of both litigants [including the Government], that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur."

Divestiture of Embassy in its present operating status is essential, not only to increase the likelihood of finding a purchaser, but also to make it possible for the new Embassy to develop into a significant independent competitive business. If, as the court intimated at one point (Tr. 967–968), the modern machinery and other assets added by the defendant are not within the divestiture order, it is doubtful whether the Embassy assets could be reorganized into a company that would survive, much less compete effectively with the other well-established dairies.

(b) The decree fails to provide adequate safeguards against a predivestiture impairment of the value of Embassy as a going concern, and against impairment of such value following divestiture. In the district court, the Government suggested that the defendant be prohibited from operating a dairy other than Embassy pending divestiture and for a reasonable time thereafter.[6] Such requirements not only

[6] The district court recognized that the defendant's operation of another dairy would "impair Embassy" (Tr. 929), but refused to prohibit such an operation (Tr. 930).

would make the Embassy business and assets more readily saleable, but also would permit a purchaser to consolidate his position without fear of having the defendant solicit or capture for its own dairy business present customers of Embassy.

(c) In view of the defendant's present market position and the district court's finding that Embassy was acquired with the specific intent to eliminate competition, the decree does not provide adequate control over future acquisitions by the defendant. The district court erred when it refused to consider, or hear argument on, the Government's proposal that the defendant be enjoined from acquiring any other dairy, unless it showed that such acquisition would not substantially lessen competition. Similar prohibitions have been held necessary or appropriate for adequate relief. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186–187; *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 130.

(d) The refusal of the district court to grant the Government visitation rights (Tr. 940–944), although contained both in the Government's and the defendant's proposed decrees, is a particularly serious handicap in the present case, since several significant provisions of the judgment depend for their effectiveness upon the defendant's compliance with a vague "good faith" standard. Without visitation rights, it will be extremely difficult for the Government to determine the defendant's compliance with the judgment. Moreover, the court denied visitation rights, not in the exercise of discretion on the facts of the case, but on the erroneous theory (see Tr. 941–942)

that such rights are comparable to an unlawful search and seizure.[7]

CONCLUSION

We submit that the questions presented by the appeal are substantial and of public importance.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

ROBERT A. BICKS,
Acting Assistant Attorney General.

CHARLES H. WESTON,
ROGER A. CLARK,
Attorneys.

MAY 1959.

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[7] Visitatorial rights were upheld by this Court in *United States* v. *National Lead Co.*, 332 U.S. 319, fn. 4, and *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 724–728 (full discussion of the problem).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Appellant*

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *Appellee*

On Appeal from the United States District Court for the District of Columbia

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MOTION TO DISMISS IN PART

WILLIAM J. HUGHES, JR.
821-15th Street, N. W.
Washington 5, D. C.

HERBERT A. BERGSON
DANIEL J. FREED
DANIEL H. MARGOLIS
918-16th Street, N. W.
Washington 6, D. C.

Attorneys for Appellee

Of Counsel:

BERGSON & BORKLAND
918-16th Street, N. W.
Washington 6, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1958

No. 942

UNITED STATES OF AMERICA, *Appellant*

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *Appellee*.

On Appeal from the United States District Court for the District of Columbia

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MOTION TO DISMISS IN PART

Appellee, Maryland and Virginia Milk Producers Association, moves to dismiss that portion of the appeal taken by the United States which complains that the judgment entered by the district court on January 22, 1959, ordering the Association to divest itself of the assets of Embassy Dairy in good faith as a going dairy business, affords insufficient relief against the acquisition of those assets.

The Government's appeal raises two questions. The first concerns the scope of the exemption which the Capper-Volstead and Clayton Acts accord to agricultural cooperatives from the prohibitions of Section 2 of the Sherman Act. That question merits this Court's review as part and parcel of the intimately related questions of exemption presented by appellee in its own Jurisdictional Statement, No. 898, this Term. But the Government's second question, attacking exercise of the trial court's discretion in fashioning a judgment that requires the complete and bona fide divestiture of assets acquired in a single transaction,[1] presents no issue of importance which merits review by itself or warrants diverting this Court's attention from the substantial questions of agricultural cooperative antitrust exemption raised by both parties.

STATEMENT

On January 22, 1959 the district court conducted a hearing (Tr. 924-977) to resolve the differences between the judgments proposed by the parties. At the conclusion of that hearing the court entered a judgment (App. 35a-37a) decreeing that (1) the Association's acquisition of the Embassy assets violated Section 7 of the Clayton Act (¶1),[2] (2) the Association's acquisition of the stock of the so-called Richfield-Wakefield Dairy did not violate Section 7 (¶2), and (3)

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[1] The question of relief will of course become moot if the Court sustains the Association's claim in No. 898 that the transaction was exempt from antitrust prosecution by the Department of Justice.

[2] All paragraph references herein are to the judgment set forth in the appendix (App. 35a-37a) to the Association's Jurisdictional Statement in No. 898.

the contract by which the Association acquired the Embassy assets, together with its ancillary covenants, violated Section 3 of the Sherman Act (¶3). Pursuant to these findings the judgment invalidated these contracts (¶7) and ordered the Association to dispose of "as a unit and as a going dairy business all assets of Embassy Dairy, Inc., tangible and intangible, which it acquired on July 26, 1954, and replacements therefor" (¶4). The divestiture must be carried out "in good faith" and requires prior approval of the district court (¶5). The Association must report its efforts to effect the divestiture to the court within 60 days of the effective date of the judgment, every 90 days thereafter and "on such other dates as [the] Court may order" (¶5). Pending divestiture the Association must "administer the assets acquired from Embassy Dairy, Inc., and replacements therefor, in good faith as a going dairy business with a view to preserving the said assets in as good condition as possible, ordinary wear and tear excepted" (¶6). The court retained jurisdiction to enable either party to apply for further orders and interpretations of the judgment, and "for the enforcement of compliance therewith and punishment of violations thereof" (¶8).

The United States has not appealed from that part of the judgment which validated the acquisition of the Richfield-Wakefield Dairy. It has, however, sought review of the judgment in this Court on four grounds: (a) that the divestiture judgment should have been directed to all assets used in the Embassy operation "as of the date of divestment" (J.S. 3)[3] rather than to assets "acquired on July 26, 1954, and replacements

[3] All J.S. references herein are to the Jurisdictional Statement filed by the United States, No. 942.

therefor" (¶4); (b) that the requirement that the Association administer the Embassy assets and replacements "in good faith" and dispose of them "as a unit and as a going dairy business" should have been supplemented by an express prohibition against operation by the Association of any dairy (including Richfield-Wakefield) other than Embassy pending divestiture and for a "reasonable time" (ten years—R. 2554) thereafter; (c) that the divestiture judgment should have prohibited the Association from acquiring any new dairy for a period of twenty years (R. 2557) unless it shows to the satisfaction of the court that such acquisition would not substantially lessen competition; and (d) that the judgment should have supplemented the requirement that the Association make frequent reports to the court by granting visitation rights to the Government.

ARGUMENT

This motion urges the Court to confine its review of the judgment below to the important and complex issue—raised in separate appeals by both the United States and the Association—of defining the scope of agriculture cooperatives' exemption from the antitrust laws. The Association opposes the Government's effort to encumber those appeals with an intense factual review of the entire record underlying the divestiture judgment. We believe that the Government's questions as to relief misconceive the province of an equity decree. On one hand, they seek to have this Court spell out the intricate details of how the district court shall execute its own mandate for "a complete divestiture, a bona fide divestiture" (Tr. 924). On the other hand, they urge this Court as a matter of law automatically to enjoin future, post-

divestiture, acquisitions and other operations by the Association on the basis of a record devoid of evidence as to the need for or propriety of such relief. We believe that such contentions, which would constrain the broad discretion reposed in district courts to fashion antitrust judgments "to fit the exigencies of the particular case," *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401, do not merit plenary consideration by this Court. The Government's failure to appeal from Judge Weinfeld's recent denial of similar relief in the Bethlehem-Youngstown merger case supports our view.

This is not a case, such as those cited by the Government where vast conspiracies or foreclosures of markets require the pervasive intervention of a district court to reform practices which have regimented an entire industry. The judgment challenged here was formulated after the district court had tried the legality of two acquisitions of retail outlets by a producer cooperative and had found one to be invalid. It thereupon undertook "to do everything to see that that single transaction is undone" (Tr. 937). In a hearing held after submission of proposed judgments by both parties, the court carefully and patiently considered all contentions and questions raised and indicated the intended application of its judgment to numerous fact situations posed by the Government. In formulating its "good faith" decree, the court assured the Government that it (Tr. 968-969):

> "always put a very broad construction on the words, 'good faith.' And any time the Government finds anything not done in good faith, you just make an appropriate application to the Court, and I will entertain it sympathetically."

That judgment on its face makes it clear that the court intends to divest the Association of all of the Embassy assets, as well as their replacements, and to restore Embassy to the market as a going dairy business independent of the Association.

A brief analysis of the four modifications of the judgment upon which review is sought here by the United States shows that two were rejected below because they exceeded the requirements of the case or involved factual details[4] which could better be handled by timely application to the court "at the foot of the decree." Two other errors now asserted by the United States were proposed in the draft judgment submitted below but abandoned at the hearing.

(a) Assets Required to be Divested

The United States urges that the district court erred by describing the assets to be divested as including only those assets acquired in 1954 from Embassy Dairy, Inc., and "replacements therefor." It seeks plenary consideration by this Court of the question whether all assets and equipment lawfully purchased or acquired by the Association since the Embassy acquisition, from Richfield-Wakefield or otherwise, should be divested if

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[4] The Court:

> "I always like equity decrees to be short and succinct and pointed, and not to go into too many details. It is humanly impossible to forecast every possible contingency that might arise; and if you anticipate certain contingencies, then you are liable to have the decree construed as though other contingencies are not covered. Whereas if you have a direct, unambiguous, broad clause, then it covers all possible contingencies. Now, if disputes arise, you come back here" (Tr 970-971).

presently used in the Embassy operation, whether or not they are "replacements" or are needed to maintain or sell Embassy as a going concern. The short answer to this contention is that it exceeds not only the relief merited[5] but the relief sought by the United States in the district court hearing.

While the Government's proposed judgment below (R. 2550-2559) did contain language similar to that urged in the Jurisdictional Statement, the objective sought to be achieved was much narrower than that urged here. The record clearly discloses that Government counsel was concerned not with the precise language of his proposed judgment but only that it "accomplish the result intended" (Tr. 946); he wanted assurance that the Richfield-Wakefield assets and other post-Embassy equipment would be covered by the final judgment if "inextricably intertwined" (Tr. 965) with the Embassy assets. This matter was not, as the Government contends (J.S. 14), postponed for future decision. The court gave such assurance, inserted appropriate language, and illustrated its application. Assets acquired from Richfield-Wakefield or elsewhere are required to be divested if so incorporated into the Embassy operation that the business cannot be sold as a going dairy concern without them (Tr. 945-948, 966-971).

(b) Operation of Another Dairy

The United States next urges that the judgment should have prohibited the Association from operating any dairy other than Embassy pending divestiture and

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[5] See opinion of Federal Trade Commission, *In The Matter of Crown Zellerbach Corp.*, 1958 CCH Trade Reg. Rep. ¶26, 923, p. 36, 462.

for a period of ten years thereafter (R. 2554). This represents, together with the contention in (a) above, an oblique effort by the Government to divest or prohibit the use of the Richfield-Wakefield assets without appealing from the district court's judgment that they were lawfully acquired.

The Government expresses concern that inadequate safeguards are provided against "predivestiture impairment of the value of Embassy as a going concern" (J.S. 15). This fear is explicitly laid to rest by the judgment itself. The Association is required prior to divestiture to administer the Embassy assets and replacements "in good faith as a going dairy business" (¶6) and to dispose of them "as a unit and as a going dairy business" (¶4), under continuing court supervision to insure good faith compliance (¶8).

The Government also urges here, as below, that the district court should have enjoined the Association from operating Richfield-Wakefield or any other dairy for ten years. Such a drastic prohibition is not, as the Government implies, a boilerplate provision inserted in every antitrust acquisition judgment. Limitations of this character obviously depend on the evidence presented to the court; yet at the hearing below the Government neither presented nor offered any evidence whatsoever to justify the injunction. In the absence of a strong showing of necessity, it would have been an abuse of discretion for the trial court to have included it. Cf. *United States* v. *National Lead Co.*, 332 U.S. 319, 353.

Moreover, the Government's effort to insulate Embassy from competition after divestiture ignores the facts, fully understood by the district court, of the highly competitive dairy business in Washington.

Many firms, representing 90 per cent of the distribution market, presently confront Embassy and will continue to confront Embassy, by whomsoever owned, with persistent efforts to capture its customers. In short, total divestiture of a going business, but not a sanctuary from competition in the thriving Washington marketplace, was assured.

(c) Injunction Against Future Acquisitions

The United States asserts that the district court "refused to consider, or hear argument on" an injunction against future acquisitions (J.S. 16). The fact of the matter is that after the district court invited argument, the Government abandoned this proposed injunction, rendering its omission unavailable as an appealable error.

At the outset of the hearing on relief, the district court stated that it had examined the proposals submitted by the parties and found that the draft proposed by the Government included certain "relief neither mentioned nor . . . contemplated by the opinion of this Court" (Tr. 924). Among such proposals was a 20 year injunction against future acquisitions (R. 2557). The court then stated: "Now if you would like to be heard upon that, Mr. Saunders, I would be very glad to hear you" (Tr. 924-925). While Government counsel thereafter argued freely and at length on numerous aspects of the proposed judgment, including meticulous attention to plurals (Tr. 962) and commas (Tr. 963), no mention whatsoever was made with respect to the modification now sought (Tr. 924-977).

Even if properly raised, however, the contention that the judgment should have enjoined future ac-

quisitions unless the Association sustains the burden of proving in advance that they would not substantially lessen competition is inappropriate here. The *Crescent* and *Schine* cases upon which the Government relies enjoined future acquisitions because the trial established unlawful acquisitions as the "pattern of past conduct." *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186. There is no such pattern here. The Government challenged two acquisitions by the Association. One was found valid and one invalid. There is no warrant in the record, no proffer of evidence, no precedent in decisions of this Court for requiring a district court to impose a twenty-year antitrust strait jacket on a party who has been found to have made but a single unlawful purchase. See *United States* v. *Bethlehem Steel Corporation* (Civil Action No. 115-328, S.D. N.Y.) where similar relief was sought by the Government but denied in the unreported judgment of December 19, 1958.

(d) Visitation Rights

The refusal of the district court to grant broad visitatorial rights over the books, records, personnel and affairs of the Association will not, as the United States contends, impair its ability to determine compliance with the divestiture decree. In fashioning a decree to supervise the disposal of Embassy Dairy, the district court believed that compliance could adequately be assured by scrutiny of the reports which the Association is required to file every 90 days and "on such other dates as [the] Court may order" (¶5). The court stated that it did "not believe the Department of Justice should be given carte blanche to examine books and papers of the defendant at any time" (Tr. 940). But of paramount importance, and overlooked by the

Government in its Jurisdictional Statement, was the assurance given by the court to Government counsel that:

> "If there is any reason for examining books and papers you may make an application at the proper time to this Court at the foot of the decree" (Tr. 941).

Such a procedure for supervising the faithful execution of a judgment squarely accords with the rulings of this Court. *Associated Press* v. *United States*, 326 U.S. 1, 22-23; *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 156-157. And district courts have not automatically inserted visitation provisions upon request of the Government. See the *Bethlehem Steel* case, *supra*.[6]

[6] Even in those cases where this Court has upheld the discretionary grant by a district court of visitation privileges, it has expressly condemned the provision sought by the Government in its proposed judgment below (R. 2558) requiring the Association not only to grant access to books, records, officers and employees, but to file reports upon demand with the Department of Justice as well. *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 728; *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 433.

CONCLUSION

For the foregoing reasons, appellee respectfully prays that so much of the appeal herein as is based upon alleged inadequacies of the relief granted by the judgment below be dismissed.

WILLIAM J. HUGHES, JR.
821-15th Street, N. W.
Washington 5, D. C.

HERBERT A. BERGSON
DANIEL J. FREED
DANIEL H. MARGOLIS
918-16th Street, N. W.
Washington 6, D. C.

Attorneys for Appellee

Of Counsel:

BERGSON & BORKLAND
918-16th Street, N. W.
Washington 6, D. C.

June, 1959

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 942

UNITED STATES OF AMERICA, APPELLANT

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS IN PART

The motion to dismiss concedes (p. 2) that the issue raised by the appeal concerning the scope of the exemption which the Capper-Volstead and Clayton Acts accord to agricultural cooperatives from the prohibitions of Section 2 of the Sherman Act "merits this Court's review", but prays (p. 12) that so much of the appeal as is based upon alleged inadequacy of the relief granted by the judgment below be dismissed.

Appellees' motion to dismiss is not authorized by the rules of this Court. The rules permit a motion to dismiss in a federal case only for alleged defect in the Court's appellate jurisdiction. As stated in Rule 16(a), the only ground for a motion to dismiss an

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appeal from a judgment of a federal court is that the appeal is not within the jurisdiction of this Court, "because not taken in conformity to statute or to these rules". The motion to dismiss does not challenge the appeal upon any such ground.

Assuming, however, that the motion to dismiss may appropriately be considered as an attempt at this preliminary stage to delimit the scope of plenary appellate review by this Court, we believe it should be rejected. This is plainly not a case where, at this posture of review, it could be said that any of the grounds for appeal is frivolous or patently insubstantial. On the contrary, as we show below, the issues raised as to the adequacy of the relief are clearly substantial. As the motion itself recognizes (p. 2), these questions of relief will not be reached by the Court if it should sustain the appellee's claim on the merits that its acquisition of the Embassy assets was exempt from antitrust prosecution. In the circumstances, we suggest that the Court should decline appellee's invitation to adjudicate the merits of the appeal, as concerns relief, at this stage.

In civil Sherman Act proceedings brought by the Government, this Court has always recognized that the measure and scope of relief granted by the judgment, following an adjudication of violation, may be, and usually is, of critical importance. Upon this may depend whether "the Government has won a lawsuit and lost a cause". *International Salt Co.* v. *United States*, 332 U.S. 392, 401. As the Court stated in *Hartford-Empire Co.* v. *United States*, 324 U.S. 570, 571, "it is unthinkable that Congress has

entrusted the enforcement of a statute [the Sherman Act] of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him." The cases in which this Court has reviewed questions of relief in Sherman Act proceedings are legion. Indeed, in several instances the opinion rendered shows that the Court regarded the relief questions as far overshadowing in importance any questions of substantive violation.[1]

The relatively cursory consideration given by the district court (Holtzoff, J.) to questions of relief underlines the need for appellate review thereof. There was no separate hearing for the taking of evidence on relief. The court's two opinions holding the Embassy acquisition illegal directed counsel to submit a proposed judgment (App. 898, 31a, 34a),[2] and opposing parties did submit widely different proposed judgments, which were considered at a hurried hearing of less than an hour and a half.[3] Early in the

[1] See *United States* v. *National Lead Co.*, 332 U.S. 319 (substantive violation, pp. 325–328; relief, pp. 328–364); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386 (substantive violation, pp. 400–401, 406–407; relief, 408–435); *International Boxing Club* v. *United States*, 358 U.S. 242 (substantive violation, pp. 249–252; relief, pp. 253–263). In *United States* v. *U.S. Gypsum Co.*, 340 U.S. 76, review was confined to relief.

[2] We use the designation "App. No. 898" to refer to the appendix to the appellant's jurisdictional statement in *Maryland and Virginia Milk Producers Assn.* v. *United States*, No. 898, this Term.

[3] At the hearing the court said (Tr. 957): "Gentleman, we are spending an awful lot of time on this. I have a jury case on trial, and I interrupted it for this. Let's move along a little more expeditiously."

hearing the court said that it would adopt the defendant's draft judgment as the basis for its decree,[4] and the judgment which it signed at the end of the hearing was this draft, with the interlineations and excisions made by the court during the course of the hearing (Tr. 975).

As to the specific relief issues raised by the appeal, we believe the following brief analysis will suffice to show their substantiality:

(a) *Assets Required to be Divested.* The court below found that appellee's acquisition of Embassy was made "with the intent and purpose of restraining trade", and that it resulted in "a foreclosure of competition" with respect to Government contracts and purchases of milk from milk producers (Supp. No. 898, 32a). It is necessary that the dairy unlawfully acquired be divested under conditions which will permit it to become a vigorous, independent retail distributor if the judgment is to "undo as near as may be the wrongs that were done" (*United States* v. *Griffith*, 334 U.S. 100, 109). Accomplishment of this end may largely turn on the physical plant and equipment to be divested. But the present judgment, as construed by appellee (Motion 7), limited divestiture to assets "so incorporated into the Embassy operation that the business cannot be sold as a going dairy concern without them". This would mean that a potential purchaser might not obtain post-acquisition

[4] The court said (Tr. 944): "Now, gentlemen, it seems to me that I ought to use the Defendant's draft as a basis for my decree. I rather like the form of the Defendant's draft anyway."

additions and improvements made to keep abreast of technological progress, and that what he would be offered would be opportunity to enter the 1960–1961 marketplace with a dairy of a 1954 vintage.

(b) *Operation of Another Dairy.* The current volume of Embassy's business would be a material factor in its value to a purchaser and in the viability of Embassy following purchase. The court itself was of the opinion that operation of another dairy pending divestiture of Embassy would "impair Embassy" (Tr. 929), but declined to frame its judgment so as to guard against such impairment (Tr. 929–930). Likewise, the marketability of Embassy's assets and its ability to survive would be adversely affected if, immediately following divestiture, appellee were free to operate a dairy and recapture its Embassy customers. On sale of a business, a covenant by the seller not to compete for a specified time is a common practice, and when appellee acquired Embassy it incorporated such a covenant, for a 10-year period, in the contract of acquisition (Govt. Ex. 29). While the judgment which the Government submitted to the district court proposed a 10-year ban on appellee's operation of a dairy, the Government's position is that the ban should be for a reasonable time (J. St. 15). If this Court should be persuaded that such relief should be granted, it might well leave to the district court determination of what would be a reasonable period for the ban. See *Gypsum Co., supra,* 340 U.S. at 94.

(c) *Injunction Against Future Acquisitions.* We deny the assertion (Motion 9) that in the district court the Government abandoned its request for re-

lief against future acquisitions. In view of the fact that the district court, after some initial consideration of the Government's proposed judgment, announced that it would base its decree on the defendant's proposed draft and in view of the court's request to counsel to proceed more expeditiously (see fns. 3 and 4, *supra*), the Government's failure to argue the future-acquisition point, which is similar in principle to other proposed relief rejected by the court (Tr. 929-930), cannot be regarded as "abandonment". The question whether appellee should be prohibited, for a reasonable period of time,[5] from acquiring a dairy without obtaining court approval upon a showing that the acquisition will not unreasonably restrain competition, presents a question of substance. Appellee's acquisition of any of the limited number of dairies operating in the Washington Metropolitan area, when appellee controls 86% of the fluid milk sold in that area, would give rise to at least dangerous probability of a violation of the antitrust laws. In these circumstances, absence of a pattern of past illegal conduct is not determinative.

(d) *Visitation Rights.* We believe this matter is sufficiently covered in our jurisdictional statement, and merely add that information provided in reports which appellee is required to file with the court are in no sense a substitute for opportunity to obtain, from an examination of appellee's records, facts bearing

[5] The Government would be satisfied with a prohibition of this kind running for a reasonable period, which might be considerably less than the 20 years proposed in the judgment which it submitted to the district court.

upon its compliance with the district court's judgment, and particularly facts bearing upon "good faith" compliance. The *Bethlehem Steel* proceeding, to which appellee refers, was a totally different situation in that it stopped a proposed merger in its incipiency and did not, as here, involve the complications necessarily inherent in terminating and undoing a consummated acquisition.

CONCLUSION

It is respectfully submitted that the motion to dismiss part of the appeal should be denied.

J. LEE RANKIN,
Solicitor General.

ROBERT A. BICKS,
Acting Assistant Attorney General.

CHARLES H. WESTON,
JOSEPH J. SAUNDERS,
EDNA LINGREEN,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 62

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *Appellant*

v.

UNITED STATES OF AMERICA

No. 73

UNITED STATES OF AMERICA, *Appellant*

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

On Appeal From the United States District Court for the District of Columbia

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BRIEF FOR THE MARYLAND AND VIRGINA MILK PRODUCERS ASSOCIATION, INC.

OPINIONS BELOW

The opinions of the United States District Court for the District of Columbia, rendered on October 16,

1958 (R. 121), November 21, 1958 (R. 480) and January 14, 1959 (R. 504), are reported at 167 F. Supp. 45, 167 F. Supp. 799, and 168 F. Supp. 880.

JURISDICTION

The judgments of the district court were entered on November 10, 1958 (R. 74), January 22, 1959 (R. 85) and January 30, 1959 (R. 88), and became final on the latter date. Fed. R. Civ. P., Rule 54(b). Notices of appeal were filed in the district court by the Maryland and Virginia Milk Producers Association on March 11, 1959 (R. 89), and by the United States on March 23, 1959 (R. 92). On June 29, 1959, this Court noted probable jurisdiction and consolidated the appeals (R. 746). 360 U.S. 927. The jurisdiction of this Court rests on Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. § 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

STATUTES INVOLVED

The statutes pertinent to these appeals are Sections 2 and 3 of the Sherman Act (Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. §§ 2, 3), Sections 6 and 7 of the Clayton Act (Act of October 15, 1914, 38 Stat. 730, as amended, 15 U.S.C. §§ 17, 18) and the Capper-Volstead Act (Act of February 18, 1922, 42 Stat. 388, 7 U.S.C. §§ 291, 292). These statutes are set forth in the Appendix, pp. 2a-6a.

QUESTION PRESENTED

Whether an agricultural cooperative, meeting the requirements of Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act and not acting

in combination or conspiracy with outsiders, is subject to original prosecution by the Department of Justice

(a) under Section 2 of the Sherman Act for monopolization or attempts to monopolize trade and commerce in the marketing of its members' product;

(b) under Section 7 of the Clayton Act for acquiring, with the proscribed effects, the assets of a dealer outlet for handling and marketing its members' product;

(c) under Section 3 of the Sherman Act for entering into the contract to acquire those assets from an outsider.[1]

STATEMENT

These cases arise on appeals from three decisions of the district court (1) granting exemption to an agricultural cooperative association from prosecution under Section 2 of the Sherman Act, but (2) denying exemption and entering judgment against the cooperative for acquiring assets in violation of Section 7 of the Clayton Act, and (3) holding that the contract by which the acquisition was made was a transaction in violation of Section 3 of the Sherman Act. The record discloses that the cooperative, not acting in combination or conspiracy with others, engaged in activities which restricted the free interplay of competitive forces in the marketing of its agricultural product. For the purpose of these appeals it is assumed that such activities would violate the antitrust laws but for the fact that the defendant is a congressionally authorized cooperative association of farmers. The central question posed, therefore, is how far federal

[1] An additional question as to the propriety of relief granted by the District Court is raised by the United States in its appeal in No. 73, and will be dealt with in our answering brief.

legislation dealing specially with agriculture and agricultural cooperatives has limited the applicability of the antitrust laws. Consideration of this question requires an understanding of the extent to which the authorized purposes and functions of a farmer cooperative inherently contradict the basic principles of competition.

The Maryland and Virginia Milk Producers Association, Inc. (hereinafter referred to as the Association) is a cooperative organization of nearly 2000 dairymen whose farms produce milk for the Washington metropolitan area (R. 123). As such, it was found by the district court to be an agricultural organization fully complying with the standards set forth in the exemption provisions of Section 6 of the Clayton Act (R. 125). It was "instituted for the purposes of mutual help because it acts as the marketing agency for all of its members and pays over to its members the proceeds of the milk sales, with a deduction, of course, for overhead and similar expenses." It does not have capital stock and is not conducted for profit, apart from that which accrues to its members. The Association was also found to meet the tests of an agricultural association as defined in Section 1 of the Capper-Volstead Act (R. 125-6). It is operated for the mutual benefit of its members, all of whom are farmers or dairymen and none of whom is allowed more than one vote. It does not deal in the products of nonmembers to an amount greater in value than is handled by it for members (R. 126). As such it is fully qualified, in the words of the statute, to engage in "collectively processing, preparing for market, handling, and marketing" milk, and to "make the necessary contracts

and agreements to effect such purposes" (R. 124; App. 4a-5a).

The history of the Association is set forth, as part of the affirmative antitrust case against it, in Government Exhibit 27 (R. 565-585; see also Def. Exh. 19, R. 692-717). This exhibit is a report of the Secretary of the Baltimore Bank for Cooperatives, an agency established under the Farm Credit Act of 1933 (12 U.S.C. § 1134 et seq.) for the express purpose of affording financial assistance to eligible farmer cooperatives in accordance with the policy and standards set forth in the Agricultural Marketing Act (12 U.S.C. § 1141 et seq.). According to the Bank's report, the Association was incorporated in 1920 in response to "a definite and pronounced economic need": "market insecurity—for the producer and the distributor" characterized by "generally chaotic conditions in the production and distribution of fluid milk for which there was a steadily increasing and stable demand," "needless price fluctuations," a "mal-distribution of surplus milk," and the "complete lack of bargaining power on the part of the producers" (R. 565). "Such conditions," the Bank's report observed, "are not conducive to the investment, labor, know-how, and business risks involved in the production of a dependable supply of high quality milk—and, therefore, are not in the best interests of the producer, the distributor, or the consumer" (R. 565-6). The Association's early efforts to create effective bargaining power through which producers could raise the level of prices received from dealers demonstrated that success hinged upon securing the membership of farmers producing a dominant share of the market's milk supply (R. 566, 568). By 1923 the Association through pooling

contracts had enlisted producers whose volume constituted over 85% of the market (R. 568). And by 1931, the Association had "reached a secure and formidable place in the market" (R. 569).

The operation of the cooperative is geared to the characteristics of its product. Milk, being a highly perishable commodity, must be moved promptly from the farm through processing plants to the consumer (R. 3, 28). And, typical of the agricultural economy, a surplus problem is created by the production of milk in excess of the market's fluid needs (R. 377). Seasonal fluctuations in the productivity of cows accentuate the problem. A milk producers' cooperative is designed to alleviate the disastrous effects upon price which competition among individual farmers would normally have on the sale of a highly perishable, surplus commodity. The cooperative gathers the farmers together, eliminates competition among them, and strives to create bargaining power by collectively marketing their product (R. 568). As marketing agent it seeks stable markets and outlets for members' milk (R. 570). It distributes the burden of surplus milk equitably among its members. By these means, it inherently and inevitably serves as an instrument for enhancing the price of milk above the level which competition would allow (R. 569).

For many years prior to 1954, the Association sold its members' milk only to dealers, or "handlers." It made no direct sales to consumers. The price which dealers paid for milk was determined according to a system known as the classified use plan. This system, prevalent in large milk markets throughout the country and typically prescribed in federal milk marketing

orders, fixes the price for milk of identical grade, quality and quantity according to the manner in which the milk is used. As summarized by the district court, the plan operated in the Washington market as follows (R. 485-6):

> For the purpose of determining the price to be charged to customers and the price to be paid by the Association to its members, the milk is divided into three categories. So much as is resold to the ultimate consumers in liquid form is placed in Class I; so much as is converted into cream or cottage cheese forms Class II; and the balance, known as surplus milk, which is transformed into other by-products, such as ice cream and powdered milk, is denominated Class III.
>
> The commodity in Class I and Class II is known in the trade as fluid milk.
>
> Different prices are charged to the customer for milk in each of the three groups, Class I receiving the highest and Class III receiving the lowest price.
>
> Since all milk delivered to the Association by its members forms a single pool, figuratively speaking, out of which all sales are made, it is impossible to allocate specific quantities to each of the three classes out of each member's contribution. Accordingly, a so-called blend price is ascertained on the basis of the proportions of total sales made by the Association in each class out of the aggregate amount sold during a specified period. The Association then pays its members on the basis of the blend price, after deducting a percentage, of course, for its maintenance and operating expenses.
>
> Manifestly, the more milk that can be sold in Class I and the less in Class III, the greater will be the blend price and the more profitable the returns to the members.

The variation in price between fluid milk and surplus milk is considerable: in mid-1954 milk sold for consumption in liquid form commanded a Class I price of $6.62 per hundredweight, while the Class II price was $3.10 per cwt. and the surplus milk in Class III sold for $2.75 per cwt. (R. 389). Fluctuations in the amount of milk which is surplus to fluid requirements can have a substantial impact on the average blend price received by members of the Association (R. 377-9; see also Gov. Exh. 115).[2]

The presence in the market of a strong cooperative benefits all producers, members and nonmembers, as well as consumers. Thus the blend price achieved through Association activities and received by its members is also the basis upon which the price paid by dealers to nonmember producers is calculated (R. 146, 377-8). Similarly, the Association's undertaking to manage the surplus problem by distributing the burden among its members benefits nonmember producers even though they do not share the cost of operating the cooperative. In fact the prosecution here conceded that independent producers "received returns equal to and in fact, better in many instances than did defendant's members since defendant's members were and are charged or assessed charges for the running of their organization" (R. 146). In addition, fluctuating market demand requires a large milk cooperative to maintain a reserve or surplus supply in order to cope with the market's peak requirements (R. 402).

Early in 1953, the Association's surplus began "increasing beyond the necessary margin" and became so

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[2] This Exhibit, a part of the record filed in this Court but not printed, is referred to pursuant to the Stipulation as to Printing of Record, part H, entered into by the parties on July 5, 1959.

excessive that "in a number of instances milk, or skim milk, went down the sewer" (R. 403). By the Spring of 1954, the surplus was having a "direct depressing effect" on the blend price (R. 377), adversely affecting Association members and nonmembers alike (R. 378). Between November 1953 and May 1954, the blend price dropped steadily from $5.30 to $4.32 (Gov. Exh. 115). The Association took several steps to raise the blend price by utilizing its surplus in other than the lowest price categories (R. 378). It instituted a vigorous advertising campaign to stimulate consumption of milk (R. 378). It purchased and distributed sixty vending machines to "capture a part of the impulse buying in the market." It tried to sell its surplus as fluid milk in other markets, such as North Carolina, South Carolina and North Dakota. It did not lower the Class I price because experience had shown that a decrease in the price of milk of as much as two cents a quart reduces enormously the returns to farmers (R. 379-80) but in terms of increased consumption "has no effect whatsoever on the buying habits of the public" (R. 379).

On April 9, 1954, the Association's Board of Directors voted "to study the advisability of applying for a Federal Marketing Order for the Washington Market" (Def. Exh. 22, R. 727; R. 382). Three days later, on April 12, William B. Hooper, Assistant Secretary of the Association, visited James J. Ward, President and owner of Embassy Dairy, Inc., "with the purpose of trying to sell him some of our surplus milk to use in his operations" (R. 382). Embassy at the time was the fourth largest dealer or handler in the market (R. 486). It purchased virtually none of its milk from the Association, sold slightly under 10% of the fluid milk bought by consumers, and obtained a large share

of the sales to federal installations by cutting prices (R. 487). Ward declined to purchase milk from the Association on the terms on which it was sold to other dealers (R. 383), but suggested that the Association buy him out (R. 384). Two days later, at a special meeting called for that purpose (R. 384), the Association's Board of Directors voted to give favorable consideration to Ward's proposal (Def. Exh. 23, R. 729). Its decision was based upon the benefit in added income which would accrue to dairy farmers from moving Class III or surplus milk into Class I or fluid channels (R. 356-7; R. 402-3).

In order to arrange financing for the purchase of Embassy the Association promptly contacted the Baltimore Bank for Cooperatives (Gov. Exh. 24, R. 554; Gov. Exh. 25, R. 556), which is authorized by law to make loans to cooperatives for "the construction or acquisition . . . of physical facilities." 12 U.S.C. § 1141e(a)(2). Full disclosure of the competitive impact of the acquisition was made by the Association to Bank representatives (Gov. Exh. 24-27, R. 554-585). After the Bank's approval of the loan appeared to be assured (Gov. Exh. 26, R. 560), the Association on May 26, 1954, entered into an agreement to purchase Embassy (Gov. Exh. 29, R. 586). In recommending that the Association's loan application be granted, the Report of the Bank's Secretary to its Executive Committee (Gov. Exh. 27, R. 565) stated that the Association wanted to buy Embassy so as "to rid the market of an unstable influence" and "to acquire an additional outlet" for surplus milk (R. 574). The Bank had previously been advised that the Association's only alternatives for eliminating market instability were to buy Embassy or apply for a federal order (Gov. Exh. 25, R. 557).

The Bank's report on the economic desirability of the acquisition relied in part upon an analysis of the acquisition which it had requested from the Department of Agriculture (R. 408, 418, 576). That study, made by Donald E. Hirsch, Chief, Dairy Branch, Farmer Cooperative Service, United States Department of Agriculture, concluded that while the Association appeared to have minimized the problems and overemphasized the potential benefits of the transaction, "the cooperative has an unusual opportunity to increase average returns to members through purchase of the Embassy milk distributing business. The potential benefits arising from use in Class I and II of a higher proportion of members' milk appear to outweigh all probable disadvantages" (Def. Exh. 19, R. 717). With regard to Embassy's price-cutting reputation, Hirsch commented that a factor favoring the acquisition was that if "it can keep current customers without granting these special discounts, the cooperative could increase the margin by obtaining higher resale prices" (R. 713). On the basis of these recommendations the Bank, on June 23, 1954, reciting that "the findings required by law having been duly made," executed a loan agreement under which the Association was to receive $2,100,000 with which to purchase Embassy (Gov. Exh. 114, R. 659). The findings which the Agricultural Marketing Act require are that the loan will be "in furtherance of the policy declared in Section 1141." That Section declares it to be the policy of Congress to promote the merchandising of agricultural commodities by, among other things,

> (3) . . . promoting the establishment and financing of a farm marketing system of producer-owned

and producer-controlled cooperative associations and other agencies

and

(4) by aiding in preventing and controlling surpluses in any agricultural commodity, through orderly production and distribution, so as to maintain advantageous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity. 12 U.S.C. § 1141(a)(3) and (4).

On July 26, 1954, the Association consummated the acquisition of substantially all of the Embassy assets (R. 490). Two months later, on October 11, 1954, counsel for the Association, knowing that the Antitrust Division of the Department of Justice was investigating its activities, including the Embassy purchase, directed a letter to Robert L. Farrington, Solicitor of the Department of Agriculture, calling attention to the conflict between antitrust and agricultural policies and requesting an investigation of the Association's conduct under the Capper-Volstead Act (Def. Exh. 64, R. 737). Under a formal delegation of authority, the responsibilities of the Secretary of Agriculture for initiating proceedings under the Capper-Volstead Act had been assigned to the Solicitor (R. 743-4). In response to the Association's letter, the Solicitor advised the Attorney General on December 10, 1954, that the Farmer Cooperative Service had, as required by law, afforded "some advisory assistance in evaluating the economic implications" of the acquisition, that the Department of Agriculture understood that "the purchase was made for the purpose of enabling the cooperative to gain better information regarding the retail market; to bargain more effectively; and to

serve its members more advantageously"; and that the Department had received no information indicating that the Association's activities in connection with Embassy violated the Capper-Volstead Act (Def. Exh. 65, R. 742).

On November 21, 1956, the Attorney General, without requesting the Secretary of Agriculture to proceed against the Association under the authority conferred by Section 2 of the Capper-Volstead Act (Def. Exh. 67, R. 745), filed this civil antitrust proceeding against the Association (R. 1). The complaint charged that through various anti-competitive practices, including the acquisition of Embassy (¶ 22d, R. 6; R. 40), the Association had attempted to monopolize and had monopolized trade and commerce in the supplying of raw milk to dealers for processing and resale as pasteurized fluid milk in the Washington metropolitan area, in violation of Section 2 of the Sherman Act (R. 5). The complaint further alleged that the "contract" under which the Association acquired the Embassy assets was made for the purpose of eliminating Embassy as an outlet for raw milk produced by others, and of eliminating competition between Embassy and dealers purchasing raw milk from the Association, in unreasonable restraint of trade and commerce in the Washington metropolitan area in violation of Sections 1 and 3 of the Sherman Act (R. 7-8). Finally, the Government asserted that the Association's acquisition of the Embassy assets had and might have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of raw milk to, and the distribution and sale of pasteurized fluid milk by, Washington metropolitan

area dealers, in violation of Section 7 of the Clayton Act (R. 8).

On February 7, 1957, the United States amended its complaint under Sections 1 and 3 of the Sherman Act so as to charge that the Embassy assets were purchased pursuant not merely to a "contract" but to "an unlawful combination and conspiracy" with the vendor and others to eliminate and foreclose competition in the Washington metropolitan area (R. 18-21). On December 10, 1957, the United States further amended its complaint to add the charge that the Association's acquisition of the so-called Richfield-Wakefield Dairy on December 7, 1957, violated Section 7 of the Clayton Act (R. 481).

The Association's answer claimed exemption from prosecution by virtue of the provisions of the Capper-Volstead Act and Section 6 of the Clayton Act (R. 31-33). When the case came on for trial in the Fall of 1958, the court ordered that the question of exemption be tried first (R. 121). On October 16, 1958, in the first of three opinions, the court ruled as a matter of law that the Clayton and Capper-Volstead Acts rendered the Association

> entirely exempt from the provisions of the antitrust laws, both as to its very existence and as to all of its activities, provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities (R. 131).

Applying this ruling to the allegations of the complaint, the district court dismissed the monopolization charges under Section 2 of the Sherman Act (R. 132). The court simultaneously sustained and ordered separate

trials of the charges that the Embassy acquisition violated Sections 1 and 3 of the Sherman Act and Section 7 of the Clayton Act (R. 133). The Sherman Act cause of action was sustained because it charged a "conspiracy" with outsiders (R. 132). The Clayton Act charge was upheld on the theory that Section 7 constitutes a "limitation of the authority of an agricultural cooperative to make contracts" (R. 133).

On November 21, 1958, the court ruled that the Association's acquisition of the Embassy assets violated Section 7 of the Clayton Act (R. 480). At the outset it noted, on the basis of this Court's decisions (R. 484),

> that the fact that all concerned acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company, and without any design to overreach anyone, does not defeat the right of the government to relief.

The court then proceeded to consider the facts solely as in an ordinary antitrust case, without reference to the defendant's special status as a cooperative. Starting with the Association's 86 per cent share of the market (R. 486), the court found that the acquisition "tended to lessen competition in the Washington market" (R. 491-2) in that it "diminished competition for the purchase of milk from producers," "reduced competition for sales to government establishments," and "tended to create a monopoly by concentrating a larger proportion of the milk supply . . . in the hands of the defendant" (R. 492). While the Association "did not achieve complete monopoly," the court said, the fact "that the defendant enhanced its dominating position in the market" was

sufficient to violate the Act (R. 492). In support of its ruling, the court relied on the Association's motives to secure the "elimination of bootlegging," to replace the "cheap uninspected 'distress' milk from other markets" with Association milk, to "increase . . . the blend price," to enlarge the membership of the Association, and to eliminate a "disturbing influence" from the market (R. 488-9). The fact that there was no enhancement of prices, i.e., that "milk prices in the area did not climb to a higher level subsequent to the transaction," was considered irrelevant by the trial judge because it was "within the realm of possibility that prices might have fallen" were it not for the acquisition (R. 493). And the fact that the acquisition was carried out with funds loaned by a "government financial institution" after the "favorable opinion" of the Department of Agriculture was deemed to be no defense (R. 493-4).

Accordingly, the court ruled that judgment should be rendered compelling the Association to divest itself of the Embassy assets and to cancel the contract ancillary to the acquisition (R. 494). At the same time it held the acquisition of the Richfield-Wakefield Dairy to be lawful under the "failing corporation" doctrine (R. 495).

On January 12, 1959, the court conducted a separate trial on the alleged combination and conspiracy under Sections 1 and 3 of the Sherman Act. By stipulation, both sides presented the case solely on the record of the prior hearings (R. 504). The prosecution offered no evidence that the Association had combined or conspired with any one to effect the Embassy acquisition. It relied solely on the contract of acquisition and the

ancillary covenant not to compete signed by the seller and by members of his family who benefited from the sale. The trial court on January 14, 1959, without any finding of combination or conspiracy, concluded that the "transaction" involving the acquisition of Embassy dairy constituted a violation of Section 3 of the Sherman Act (R. 506). On January 22, 1959, judgment was entered under both Section 7 and Section 3 (R. 85), and by judgment dated January 30, 1959, the court dismissed the complaint under Section 1 of the Sherman Act (R. 88).

SUMMARY OF ARGUMENT

The Capper-Volstead Act of 1922 establishes a federal charter for farmer cooperative activity. In Section 1, competing producers of agricultural products are authorized, without limitation, to combine in cooperative organizations. Such organizations may integrate vertically into all stages of processing and marketing products, have marketing agencies in common with other cooperatives, and make all contracts necessary to carrying out these purposes. The restraint of trade or potential for monopoly inherent in such anticompetitive combinations is recognized in Section 2. It prescribes a detailed procedure by which any cooperative (1) found by the Secretary of Agriculture to have monopolized or restrained trade "to such an extent that the price of any agricultural product is unduly enhanced," and (2) not obeying or appealing from the Secretary's order to cease and desist from monopolization or restraint of trade, is subject to (3) enforcement proceedings by the Department of Justice in district court where full antitrust equitable relief may be obtained.

The relationship between the Capper-Volstead Act and the antitrust laws has been examined by this Court only once. In *United States* v. *Borden*, 308 U.S. 188 (1939), it held that Capper-Volstead did not go so far as to exempt farmer combinations from antitrust prosecution when they participated in combinations or conspiracies with persons and corporations themselves subject to conventional antitrust standards. We believe that the *Borden* test of conspiracy with outsiders presents the only situation in which farmer cooperatives may be subjected to criminal or civil prosecution under the Sherman or Clayton Acts. A compelling legislative history, not heretofore examined in the context of a nonconspiracy case, discloses that Capper-Volstead was expressly designed to provide the exclusive method for proceeding against restrictive or monopolistic conduct by farmer cooperatives acting alone.

I. The Capper-Volstead Act was the product of pleas to halt the criminal prosecution of farmers. The antitrust exemption provided by Section 6 of the Clayton Act had proved to be inadequate. While the mere combination of competing producers was exempt from antitrust dissolution, the use by the combination of its economic power in the market was continually threatened with antitrust prosecution. E.g. *United States* v. *King*, 250 Fed. 908 (1916).

The legislative development of the Capper-Volstead Act shows that Congress had a dual purpose: to preclude direct Sherman Act prosecution of cooperatives and yet protect the public against the danger that farmer monopoly might raise prices too high. A study of the progress of the Act through two

Congresses discloses remarkable evidence that authorization of monopoly and the exclusivity of the Section 2 remedy were the precise issues considered and resolved.

Section 2 of the Act was carefully drafted to accommodate these purposes. Representative Volstead and Senator Capper revealed that it was modeled after provisions of the original Clayton and Federal Trade Commission Acts. Section 2 consolidated the ordinarily alternative procedures of (1) antitrust regulation by administrative agencies, typified by Section 11 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and (2) civil antitrust prosecution by the Department of Justice under Section 15 of the Clayton Act and Section 4 of the Sherman Act. These procedures were made consecutive rather than alternative in Capper-Volstead's control over farmer cooperatives. The Secretary of Agriculture was to determine whether a cooperative's monopoly or restraints of trade unduly enhanced prices; upon an affirmative finding, he was empowered to issue an order not against the high prices, but against the monopolization or restraints themselves. The Department of Justice was then to enforce the Secretary's order in district court where relief coextensive with that obtainable under the Sherman and Clayton Acts would be available.

The course through Congress of the bill so drafted revealed sharp controversy not over its meaning but as to its wisdom. The purpose was "not to exempt them and leave no remedy at all, but to exempt them and provide another tribunal." Accordingly, the bill "gives them a status of their own, fixes a different method of proceeding, and absolutely deprives the

court in the first instance, of examining into the question of whether or not they have violated the law." In the 66th Congress, opponents in the Senate added amendments to forbid monopoly and place cooperatives under the jurisdiction of the Federal Trade Commission instead of the Secretary of Agriculture. The House refused to concur. In the 67th Congress, the Senate Judiciary Committee struck out Section 2 in its entirety and proposed re-enacting Section 1 alone with an express antimonopoly amendment. During the extensive debate that followed, the desirability of denying the right of the Attorney General to proceed against farmer cooperative monopolies, particularly in milk, was at the heart of the debate. Supporters of the House bill, however, refused "to hold the sword and threat of the Sherman Act" over all farmers simply because a few commodities such as milk might be monopolized. In the end, the Senate overwhelmingly rejected its Judiciary Committee's antimonopoly amendment and refused to replace the Secretary of Agriculture by the Federal Trade Commission. The bill thereafter became law.

An interpretation of Section 2 of the Capper-Volstead Act as a mere alternative to ordinary antitrust prosecution would be a travesty against the purpose of the 67th Congress. Although Capper-Volstead was passed to protect farmers against criminal prosecution, it would be interpreted as if the purpose had been to punish them by imposing an additional enforcement scheme. Farmer cooperatives, under the government's theory, would be subject to three antitrust procedures: by the Federal Trade Commission, by the Department of Justice, and by the Secretary of Agriculture supplemented by the Department of Justice. Such an

interpretation not only contradicts purpose; it ascribes to Congress the enactment of a nullity. For if conventional antitrust proceedings are available against monopolizing cooperatives, recourse would never be had to a procedure by which Sherman Act relief would have to await prior proceedings by the Secretary of Agriculture and proof not only of monopolization but of undue enhancement of prices as well.

The exclusivity of the Capper-Volstead procedure was emphasized in the 1950 amendment to Section 7 of the Clayton Act. Apart from confining its asset acquisition prohibitions to corporations "subject to the jurisdiction of the Federal Trade Commission," the last paragraph of the amendment stated that nothing in Section 7 would apply to transactions consummated under statutory authority given by any of seven specialized agencies, including the Secretary of Agriculture. No federal statute confers express authority on the Secretary to give advance approval to acquisitions. But the legislative history of the Section 7 amendment is revealing. It shows that the original version of the amendment made no mention of the Secretary of Agriculture. But after hearings had brought out the impact of the bill on the acquisition of dairy plants by Capper-Volstead cooperatives, already subject to proceedings under Section 2 of that Act, the House Judiciary Committee amended the bill to include the Secretary of Agriculture. And House Report 1191 of the 81st Congress stated that the purpose of the last paragraph of Section 7 was simply to provide that the "bill should not apply to corporations coming under the jurisdiction" of the seven agencies because "there is no disposition to change the present arrangement regarding them."

The Capper-Volstead Act itself was thus considered by the authors of the Section 7 amendment to authorize acquisitions by those cooperatives which are subject to the jurisdiction of the Secretary of Agriculture. Moreover, it would make no sense for Section 7 of the Clayton Act, designed to forbid incipient violations of the Sherman Act, to outlaw the tendency to monopoly of a cooperative's vertical integration when, fully ripened, that monopoly would be exempt from the Sherman Act.

On the basis of the Capper-Volstead Act, interpreted as the 67th Congress intended, the government's complaint under Section 2 of the Sherman Act was properly dismissed, and under Section 7 of the Clayton Act should have been dismissed, upon the finding made by the district court that the lone defendant was a Capper-Volstead cooperative. And the charge that the assets of Embassy Dairy were acquired in violation of Sections 1 and 3 of the Sherman Act should have been dismissed upon the failure of evidence or finding as to any combination or conspiracy with outsiders.

II. Capper-Volstead's removal of farmer cooperatives from conventional antitrust procedures and competitive standards has been reinforced by subsequent actions of Congress. New laws and new agencies were created expressly to aid the farmer and his cooperatives in dealing with difficult competitive problems. In the Cooperative Marketing Act of 1926, the Agricultural Marketing Act of 1929, and the Agricultural Marketing Agreement Act of 1937, Congress has demonstrated its policy "to protect, control, and stabilize" the marketing of farm commodities, to control agricultural surpluses and prevent "undue or excessive fluctuations or depressions in prices," and to promote

the establishment of a farm marketing system by producer cooperatives. If farmers through their cooperatives and federations of cooperatives are unable to control competition, they may enlist the aid of the Secretary of Agriculture to fix minimum prices that "all handlers shall pay . . . for milk purchased from producers or associations of producers." Federal agencies, in turn, have persistently urged cooperatives to grow in size and market power, to eliminate the middleman by acquiring retail outlets, and to adopt classified use pricing systems in order to secure price stability.

Under classic antitrust doctrines the possession of monopoly power, purposefully acquired, is sufficient to violate the Sherman Act irrespective of whether prices are raised or competitors are actually excluded. *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *Aluminum Company of America* v. *United States*, 148 F. 2d 416 (2d Cir. 1945). Application of these conventional standards to farmer cooperatives would plainly subject them to criminal antitrust prosecutions for achieving or seeking the very market power which Capper-Volstead authorizes them to have and federal agencies have actively encouraged them to acquire. That antitrust cliches and concepts have no place in a farmer cooperative's monopoly market is aptly illustrated by the complaint in this case.

The Department of Justice charged, for example, that the Association "fixed and maintained arbitrary and non-competitive prices and terms for the sale of milk" and engaged in other pricing practices which resulted in "denying consumers the opportunity to buy fluid milk at prices resulting from free and open competition in the production and sale of milk." Yet free and open competition is precisely what Capper-

Volstead and other farm legislation are designed to discourage. And when a producer cooperative reaches monopoly size, any price that it charges is "fixed." *American Tobacco Co.* v. *United States*, 328 U.S. at 811. The complaint also charged that the cooperative had engaged in "predatory pricing." But in support of its use of this antitrust cliche, the government pointed to instances in which prices charged to dealers within the monopoly market were higher than those charged where competition existed. While such a contrast might support the condemnation of an industrial monopoly, in agriculture it is a sign that the producers in the monopoly market have achieved the congressional goal. In still another allegation, monopolization was said to have been effectuated by the Association's conduct in seeking and urging "action by governmental agencies for the purpose of excluding or eliminating competition." Such conduct by cooperatives has been squarely sustained by this Court's decision in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939).

The trial of the Association's acquisition of Embassy Dairy, alleged as a violation under all counts of the complaint, affords the most striking illustration of agricultural policy under antitrust attack. As authorized by Section 1 of the Capper-Volstead Act, the purchase of Embassy was consummated by a contract needed to carry out the purpose of collective processing and marketing. As authorized by Section 7 of the Agricultural Marketing Act, it was financed with a loan of federal funds from a regional bank for cooperatives upon findings that the acquisition would further the anticompetitive policies of the statute. The loan was approved only after an analysis by the Farmer

Cooperative Service of the Department of Agriculture had concluded that the acquisition would probably achieve the desirable goals of alleviating the market's surplus problem, eliminating price cutting and enhancing returns to producers. Following its consummation, the acquisition was reviewed by the Department of Agriculture, which advised the Attorney General that no violation of the Capper-Volstead Act had been found. And at trial the Director of the Marketing Division of the Farmer Cooperative Service testified that the acquisition was consistent with the studies and advice which that Service had been giving to cooperatives.

For the very same reasons that agricultural statutes authorized and agricultural agencies financed or approved the Association's acquisition of Embassy, the Department of Justice prosecuted it and the district court found it to have violated Section 7 of the Clayton Act and Section 3 of the Sherman Act. Only by interpreting the Capper-Volstead Act as we have urged, and as the 67th Congress intended, can conflict between the Department of Justice on the one hand and its coordinate agricultural agencies on the other be avoided, and can cooperative associations of farmers be removed from the threat of prosecution for carrying out federal policy in agriculture.

ARGUMENT

Introduction

The day when the law made farmers adhere to the rule of "free competition, free markets and free enterprise" is a memory of the distant past. Federal and state governments have long since recognized that the never ending struggle against surplus production and

low prices required a wholly new set of standards and controls to uplift and to stabilize, rather than expose to destructive competitive forces, the economy of agriculture. It is a lesson of history eloquently echoed in the decisions and opinions of this Court. "Since Connolly's case was decided," nearly 60 years ago,

> an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to the antitrust laws; have relieved their organizations from taxation. *Tigner* v. *State of Texas,* 310 U.S. 141, 145-6 (1940).

In no area of agriculture have the need and methods for departing from competitive principles been explored by this Court so fully or so often as in the realm of farmer marketing of milk. E.g. *Nebbia* v. *New York,* 291 U.S. 502 (1934); *United States* v. *Rock Royal Co-op,* 307 U.S. 533 (1939); *Stark* v. *Wickard,* 321 U.S. 288 (1944); *Brannan* v. *Stark,* 342 U.S. 451 (1952). Cases such as these describe in detail the economic conditions which have led this Court and state courts to uphold statutes that sanctioned and spurred the development of anti-competitive agricultural cooperatives on the theory that "combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen." *Tigner* v. *State of Texas,* 310 U.S. at 145; see cases cited in *United States* v. *Rock Royal Co-op,* 307 U.S. at 563, n. 27.

But it is also in a milk case that this Court marked the boundary beyond which even special legislation governing farmers and their products did not go. In *United States* v. *Borden Co.*, 308 U.S. 188 (1939), a district court had dismissed an indictment under Section 1 of the Sherman Act charging conspiracy among a milk producers cooperative, major distributors and their allied groups, a labor union, municipal officials, and others, to restrain trade in the distribution of milk in the Chicago market. This Court reversed. It held that the Agricultural Marketing Agreement Act did not remove commerce in agricultural commodities from protection by the Sherman Act where restraints were imposed by "conspiring producers, distributors and their allies." 308 U.S. at 198, 202-3. *Borden* further held that the Clayton and Capper-Volstead Acts did not immunize agricultural cooperative organizations from the reach of the Sherman Act if they participated in "any combination or conspiracy with other persons in restraint of trade." 308 U.S. at 204.

The Issue in This Case

In the 20 years since *Borden* no decision of this Court has challenged the principle that a farmer cooperative may interfere with and restrain competition in the marketing of its products so long as it does not join in combination or conspiracy with an outsider,—a non-farmer or non-farmer group. On these appeals, the position taken by the Government expressly presents such a challenge. As conceded in its Jurisdictional Statement in No. 73 (p. 9), the Government does "not contend that the *Borden* decision is fully determinative of the issue presented here," i.e. in the appeal under Section 2 of the Sherman Act.

The Government states that the issue which reaches beyond *Borden* is "whether the Clayton Act and the Capper-Volstead Act confer upon an agricultural cooperative, not acting in combination or conspiracy with outsiders, absolute immunity to monopolize and to attempt to monopolize trade in an agricultural product." The words "absolute immunity" are, of course, an overstatement because the Capper-Volstead Act itself provides in great detail for proceedings against monopolizing cooperatives under specified circumstances. But insofar as "absolute immunity" means exemption from original proceedings under the Sherman and Clayton Acts, we agree that the issue here is stated correctly by the Government.

We believe, moreover, that the issue thus stated is central not only to the Government's Section 2 appeal but to the Association's appeals under Section 3 of the Sherman Act and Section 7 of the Clayton Act as well. The development of the case as it progressed through the district court demonstrates that this is so. When first filed, the complaint consisted of charges under Sections 1, 2 and 3 of the Sherman Act and Section 7 of the Clayton Act, all of which were devoid of any reference to participation by the Association in any combination or conspiracy (R. 1-12). Two and a half months later an amended complaint was filed for the unmistakable purpose of bringing the Section 1 and 3 allegations within the *Borden* rule (R. 12). The simple charge that the Association had "made and executed a contract" to purchase the assets of Embassy Dairy, Inc., for purposes in unreasonable restraint of trade (Complaint ¶ 24, R. 7-8) was transformed into more prolix allegations that the signatories to the Embassy contract had "been engaged in an un-

lawful combination and conspiracy" for precisely the same purposes (Amended Complaint ¶¶ 24-28, R. 18-21). Were it not for this Court's decision in *Borden*, no such change would have been required since charges of "contract" and of "combination and conspiracy" ordinarily carry equal weight under Sections 1 and 3 of the Sherman Act. 15 U.S.C. §§ 1, 3.

The "conspiracy" amendment, however effective it may have been to enable the Government to state a legally sufficient charge against a farmer cooperative (R. 132), was in effect abandoned at trial. No evidence apart from the contract (R. 586), its ancillary covenants (R. 597) and their execution was offered in support at the Section 7 trial. And when separate trial was held on the charges under Sections 1 and 3, both sides rested on the prior record without offering additional evidence (R. 504). In ruling that Section 3 of the Sherman Act was violated, the district court made no finding, no conclusion, no mention of combination or conspiracy (R. 504-6).

What the district court did find in this respect is of especial significance. In its first opinion on October 16, 1958, the court had squarely followed *Borden* by ruling that the exemption of cooperatives from anti-trust prosecution was lost "when they step outside of their field and conspire with persons who are not producers of agricultural products" (R. 130). It was expressly on this ground that the court upheld the cause of action under Sections 1 and 3 of the Sherman Act as "clearly within the exception of the Borden Case" (R. 132). But when the ensuing trial ended, the decision holding Section 3 to have been violated was based solely on findings and conclusions, repeated nine

times, which referred to the Embassy acquisition simply as a "transaction" (R. 504-6).

As the case arrives in this Court, the acquisition of the assets of Embassy Dairy, Inc. is relevant to all three charges: as a means of monopolization in the Section 2 case (R. 18, ¶ 22d; R. 40), as a contract or "transaction" in the Section 3 case (R. 504-6) and as an "acquisition" in the Section 7 case (R. 480-95). All notions of combination or conspiracy with outsiders are gone (R. 49). The concession by the United States to the effect that liability in the Section 2 case is not determined by *Borden* governs the entire appeal. On this basis, the issue which pervades the case is clear: Does the *Borden* rule draw the line on the applicability of the antitrust laws to farmer cooperatives, or is there an as yet unarticulated test, short of conspiracy with others, that can distinguish the lawful from the unlawful anticompetitive acts of an association of farmers authorized to market their product together?

We believe that the freedom of farmer cooperatives to act without fear of direct Sherman Act prosecution is limited only by the *Borden* test. The provisions of the Capper-Volstead Act, as illuminated by a compelling and heretofore unexamined legislative history, were clearly designed to provide the exclusive standard and procedure for controlling monopolistic conduct by farmer cooperatives acting alone. This conclusion is reinforced by extensive federal legislative and administrative action which, in seeking to reduce the destructive role of competition in the marketing of farm products, has specifically promoted activities that violate conventional antitrust standards.

I. THE CAPPER-VOLSTEAD ACT PROVIDES THE EXCLUSIVE PROCEDURE FOR CONTROLLING MONOPOLISTIC CONDUCT BY FARMER COOPERATIVES ACTING ALONE

The Capper-Volstead Act was enacted in 1922 for the purpose of clarifying the relationship between farmer cooperatives and the antitrust laws. In Section 1 it describes a wide range of market activities in which competing farmers may engage collectively. On its face that Section grants broad authority to cooperatives to achieve marketwide domination and power. In Section 2, the Capper-Volstead Act sets forth standards to limit the authorized anticompetitive conduct of farmer cooperatives and establishes a comprehensive remedial procedure. In contrast to Capper-Volstead, the Sherman and Clayton Acts prohibit combinations of competitors and circumscribe the acquisition of dominance and power. The philosophies underlying these statutes, agricultural and antitrust, thus conflict in their basic premises. Are the remedial procedures established by these divergent laws nevertheless intended to apply concurrently? Or is the Capper-Volstead Act designed to supplant conventional antitrust standards and remedies in the regulation of farmer cooperatives—absent a *Borden* situation?

A. The Statutory Background of Capper-Volstead

1. The Sherman Act

The first mention of agricultural antitrust exemption dates back to the Sherman Act itself. On March 25, 1890, Senator Sherman offered a proviso to be added at the end of Section 1 as follows (21 Cong. Rec. 2726):

> Provided, that this Act shall not be construed to apply . . . to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture made with a

view of enhancing the price of their own agricultural or horticultural products.

The Senate, while sitting as a Committee of the Whole, agreed to the proviso (21 Cong. Rec. 2726), but it was later dropped by the Senate Judiciary Committee without comment. Whether the proviso was deleted as undesirable or merely as unnecessary is not clear (51 Cong. Rec. 13663, 14016), but whatever the reason, the legal effect of congressional failure to adopt it in 1890 was settled by this Court in 1908 in *Loewe* v. *Lawlor,* 208 U.S. 274, 301, where Chief Justice Fuller stated:

> The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the Act, and that all these efforts failed, so that the Act remained as we have it before us.

2. The Clayton Act

Following *Loewe* v. *Lawlor,* there was a widespread demand for an end to the threat of prosecution as unlawful combinations in restraint of trade that hung over labor and farm organizations. Section 6 of the Clayton Act was the result. It provided:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof be held or construed to be illegal

> combinations or conspiracies in restraint of trade under the antitrust laws.

On its face, the scope of Section 6 was unclear. Competing farmers were unmistakably authorized to combine in organizations which, of themselves, were not to be held in violation of the antitrust laws. Ambiguity arose when the statute authorized exemption for both "existence and operation" of farm organizations, but limited that exemption to "lawfully carrying out" their "legitimate objects." The legislative history of Section 6 demonstrates that this ambiguity was the fruit of compromise between those who opposed any exemption and advocates of complete immunity. As we shall later show, this history is in marked contrast to that of Capper-Volstead.

The Clayton Act was introduced on April 14, 1914 as H.R. 15657 of the 63rd Congress, Second Session. House Report 627 stated that the provision which ultimately emerged as Section 6 was designed to remove all doubt as to the legality of farm and labor organizations and that (p. 16)

> the law should not be construed in such a way as to authorize their dissolution by the courts under the antitrust laws.

Minority reports were filed by Congressmen Volstead, Nelson and Morgan, complaining that the bill did not sufficiently aid farmers. One view was that

> the only sort of farmer organization which this section sanctions is one which does nothing more than to discuss better agricultural methods. As soon as farmers combine to get better prices for their products, or to sell directly to consumers, this paragraph affords them no relief from the antitrust laws. H. Rep. 627, Part 3, p. 10.

When the bill reached the floor of the House, Representative Webb of North Carolina, Chairman of the Judiciary Committee, offered as the Committee's amendment language which ultimately became the last part of Section 6 (51 Cong. Rec. 9538):

> nor shall such organizations, orders, or associations, or members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

The Committee member who had drafted this language, Representative Henry of Texas, stated (51 Cong. Rec. 9540):

> We called into the conference with us the heads of the American Federation of Labor, and submitted this amendment to them, and said to them that we believed its adoption as an addition to section [6] would clearly exempt labor organizations and farmers' organizations from the provisions of the antitrust laws.
>
> They agreed with us; they called their counsel into conference with them and with us, and we all concurred that this amendment added to the paragraph of section [6] would give these organizations what they have desired so long, and all they have been struggling for since the original enactment of the Sherman antitrust law.
>
> In my judgment, when Congress was dealing with "combinations in restraint of trade" it never intended that the law should apply to labor organizations or farmers' organizations without capital and not for profit. The courts took a different view of it and construed the act as it was never intended that it should be interpreted. The time has come when we can correct that error and write the language in the law as those gentlemen insist that it should be and should have been.

Representative Barkley of Kentucky also took the view that the Webb amendment exempted labor organizations and farmer cooperatives from the antitrust laws (51 Cong. Rec. 9554). But numerous congressmen took an opposite view. Representative Volstead urged that the amendment be clarified "so that it will not be open to dispute as to its meaning" (51 Cong. Rec. 9564). He stated:

> It is very unfortunate that an amendment should be proposed to this bill which must of necessity go into the courts after it becomes a law before anybody will know definitely just what it means. It looks as though it has been drawn to deceive somebody.

His plea was echoed by others but the Webb amendment was adopted without change by a vote of 207 to 0 (51 Cong. Rec. 9566).

During the debate, Chairman Webb was evasive as to his views on the full meaning of the amendment. While appearing to favor a narrow interpretation (e.g. 51 Cong. Rec. 9567), he later took a broader view in response to a specific question (51 Cong. Rec. 9578):

> Mr. MANN. So that if a million farmers, if they could get them to agree, could agree not to sell cotton below a fixed price or corn or wheat or any other product below a fixed price, and that agreement would be lawful?
>
> Mr. WEBB. So long as the farm products are in the hands of those who produce them.

Dissatisfaction with the Webb amendment prompted Representative Thomas of Kentucky to offer a substitute (51 Cong. Rec. 9538):

> the provisions of the antitrust laws shall not apply to agricultural, labor, consumers, fraternal, or horticultural organizations, orders or associations.

This amendment was rejected by a vote of 105 to 69 (51 Cong. Rec. 9569), and without further change the bill passed the House (51 Cong. Rec. 9911).

When the bill reached the Senate, the report of the Judiciary Committee stated (Senate Report 698, 63rd Cong., 2d Sess., p. 2):

> The other important and general purposes of the bill are to exempt labor, agricultural, horticultural, and other organizations from the operations of the antitrust acts.

Senator Culberson, Chairman of the Committee, declared on the floor (51 Cong. Rec. 13848):

> Following the original purpose of the framers of the Sherman antitrust law, the bill proposes expressly to exempt labor, agricultural, horticultural, and other organizations from the operation of the antitrust laws.

Senators who took a narrower view thought the bill merely protected organizations from being prosecuted "for performing lawful acts." Within such category they gave the examples of "withholding crops for higher prices, refusing to work for certain wages and acts of that character" (51 Cong. Rec. 13848). Senator Pomerene, on the other hand, believed that Section 6 was drafted too broadly because it would permit organizations to engage in unlawful activities (51 Cong. Rec. 13911). Others, who favored the bill because it placed agricultural organizations outside the Sherman Act, suggested that the permission given by the bill

for "lawfully carrying out the legitimate objects thereof" meant that (51 Cong. Rec. 13967):

> An act will be lawful in this connection unless it is prohibited by some special statute or by common law.

As in the House, there were fervent pleas to clarify the scope of the section since it was being supported by so many who held conflicting views as to its meaning (51 Cong. Rec. 14011).

Near the end of the debate, Senator Cummins offered an amendment to delete the words "agricultural and horticultural" because they would repeal the antitrust laws in important respects (51 Cong. Rec. 14586). He did not want to permit such organizations to "forestall the market" or "to come together for the purpose of increasing the price or affecting the trade in the things in which the members of the association deal." The Cummins amendment was opposed by many, such as Senator Pittman of Nevada, who believed it to be highly desirable that (51 Cong. Rec. 14587-8)

> if they can not be held or construed to be illegal combinations or conspiracies, then they are not subject to prosecution under this act, or not subject to the jurisdiction of the court under this act.

The Cummins amendment was rejected by a vote of 39 to 20 (51 Cong. Rec. 14590) and shortly afterwards the bill was passed in the form in which it became law (51 Cong. Rec. 14610, 14737, 16170, 16344).

3. The Consequences of Ambiguity

The legislative history of Section 6 of the Clayton Act shows that different members of Congress supported its language for opposite reasons. Amendments were adopted by men who disagreed as to their meaning or acknowledged that the meaning was unclear. And the Reports themselves drew different conclusions from identical language, the Senate Report declaring that its purpose was to "exempt" farm and labor organizations while the House Report merely indicated that the application of those laws to agriculture and labor was being limited.

One effect of the Act is clear. Since the last clause of Section 6 expressly provided that agricultural organizations shall not be held "to be illegal combinations or conspiracies in restraint of trade," and both Houses agreed that courts would be precluded from ordering dissolution, and no limit was placed on the size of any such organization, there is no doubt that a cooperative was fully authorized to enlist 100% of the farmers in any market without fear of being held an unlawful monopoly. But with respect to the authorized scope of activities, the language was subject to conflicting interpretations.

The failure of Section 6 to protect cooperatives against antitrust prosecution soon became apparent. In *United States* v. *King*, 229 Fed. 275 (D. Mass. 1915), an indictment under Section 1 of the Sherman Act against members of the Aroostook Potato Shippers' Association for conspiracy in restraint of trade was upheld. The court stated that

> when an association controlling 75 per cent of a certain commodity refuses to do business with any

> given dealer in it its action so clearly and naturally restrains his trade that his intent to do so must, I think, be presumed from the action itself.

Such an association, the court ruled,

> had no right to endeavor to enforce its judgments by insisting that outsiders also obey them or else be blacklisted. 229 Fed. at 279, 280.

The following year, the Association came before the same court under a new indictment. *United States* v. *King*, 250 Fed. 908 (1916). This time the defendants contended that they were (p. 909)

> an agricultural organization within the Clayton Act, and that they are not therefore subject to prosecution, even assuming that otherwise they would be.

The district court did not agree. First, it held that the character of the Association as set forth in the indictment did not meet the requirements of Section 6 of the Clayton Act. Second, in dicta, the court stated that

> even if it were so, I do not think that the coercion of outsiders by a secondary boycott, which was discussed in my opinion on the former indictment, can be held to be a lawful carrying out of the legitimate objects of such an association. That act means, as I understand it, that organizations such as it describes are not to be dissolved and broken up as illegal, nor held to be combinations or conspiracies in restraint of trade; but they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations. 250 Fed. at 910.

Criminal prosecutions such as *King* were oppressive to farmer organizations, even when unsuccessful. The fact that Section 6 did not remove the threat of indictment led to pleas that Congress act again. What the farmers sought was not unqualified freedom to monopolize, but a system that would place them under supervision other than that of the Department of Justice and its district attorneys.[3] Congress provided this in the Capper-Volstead Act.

B. The Design of Capper-Volstead

Although the Capper-Volstead Act (App. 5a) does not in terms confer exemption from the antitrust laws, it has long been understood to be an exemption statute. Only eight years after its enactment, Attorney General Mitchell advised the President that the object of the Capper-Volstead Act "was primarily to insure cooperative associations that qualified thereunder immunity from prosecution under the Federal antitrust laws." 36 Op. Atty. Gen. 326, 333 (1930). And this Court itself has only recently referred to the Capper-Volstead Act as "one of the specific exemptions from the operation of the antitrust laws," one of the exceptions made by Congress "to the generality of monopoly prohibitions:" *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 388 (1956). The issue in this Court is not whether the Capper-Volstead Act is an exemption statute but how far the exemption extends.

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[3] See Hearings Before a Subcommittee of the Committee on the Judiciary, U.S. Senate, 66th Cong., 2d Sess., on S. 4344, A Bill to Authorize Association of Producers of Agricultural Products, at 5-6, 9, 10, 27-28; and hearings before the same committee in the 67th Congress, 1st Session, on H.R. 2373 and H.R. 13931, at 84.

1. The Statute On Its Face

Because the language of Capper-Volstead, like Section 6 of the Clayton Act, undertook to authorize the creation of agricultural cooperatives, no evaluation of that language can ignore the comparison with the wording of Clayton. At the outset it is clear that Capper-Volstead liberalized the eligibility requirements for cooperatives. Whereas the Clayton Act refers only to agricultural organizations "not having capital stock," Section 1 of Capper-Volstead more comprehensively covers all "associations, corporate or otherwise, with or without capital stock," and carefully prescribes how such associations may qualify for its benefits. Had the purpose of Congress merely been to broaden the Section 6 exemption to include stock as well as non-stock organizations, an amendment adding or deleting a few words in the Clayton Act would have sufficed.[4] But Capper-Volstead went further. Whereas the language of Clayton is exclusively negative, stating simply that the antitrust laws shall not apply to the lawful conduct of cooperatives, Section 1 of Capper-Volstead makes an affirmative grant of authority. It says that farmers may act together for the purpose of collectively performing each of the vertically integrated functions of processing, preparing for market, handling and marketing. These functions form, of course, the entire path which a commodity travels from the farm to the consumer. The farmers and their associations may have marketing agencies in common and may make all contracts necessary to carrying out these purposes. There are no words of limitation whatever.

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[4] This was exactly the point of Congressman Igoe, floor leader of the opposition to Capper-Volstead in the House (App. 14a).

But the single most revealing aspect of Capper-Volstead is found not in Section 1 but in Section 2. Whereas Section 6 of the Clayton Act offers no alternative procedure to regulate the organizational activities it exempts, Section 2 of Capper-Volstead prescribes an elaborate regulatory scheme replete with overtones of substantive and procedural antitrust law. If no exemption from ordinary antitrust enforcement was intended, why did Congress establish the carefully drawn and comprehensive procedure provided for in Section 2 of the Capper-Volstead Act? The position that Section 2 was meant merely to give the Government an additional weapon against cooperatives turns out upon study of that Section to be untenable.

Section 2 requires the Secretary of Agriculture to proceed against a cooperative if he believes that it monopolizes or restrains trade "to such an extent that the price of any agricultural product is unduly enhanced by reason thereof." 7 U.S.C. § 292. The initial determination is to be made after administrative hearings. If the charge is established, the Secretary of Agriculture must issue an order against monopolization or restraint of trade. In the absence of voluntary compliance, the Department of Justice must proceed to enforce the order in a district court. There the cooperative may secure a new hearing with prima facie effect being accorded to the Secretary's findings. Full antitrust equitable relief may be ordered by the district court.

Plainly, resort to this complex administrative-judicial scheme would be an act of folly if the ordinary antitrust prohibitions against monopolization and restraint remain fully applicable to cooperatives. For

under the antitrust laws alone, the Department of Justice can achieve precisely the same equitable relief without a prior proceeding in the Department of Agriculture and without the necessity of proving in district court not only that the cooperative monopolized or restrained trade but also that it enhanced prices unduly.

Interpreting Capper-Volstead as a mere alternative to direct antitrust prosecution would render superfluous its Department of Agriculture proceeding and its requirement to prove undue enhancement. Such an intention cannot be ascribed to Congress lightly or without assurance that no more reasonable result was intended. This is not to say that the Capper-Volstead procedure was meant to be exclusive when an agricultural cooperative combined or conspired with outsiders. And in *United States* v. *Borden Co.*, 308 U.S. 188, 206 (1939), this Court expressly held that in such circumstances "the procedure under Section two of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to cooperative agricultural producers by Section one." The Court's opinion in *Borden* clearly did not go beyond construing Capper-Volstead as occupying an auxiliary role in conspiracy situations.[5] It stated:

> But as Section one cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment,

[5] The conspiracy basis of the *Borden* ruling was reemphasized in *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 808 (1945), where, in relying upon *Borden*, this Court itself underscored the language of Chief Justice Hughes that the right of agricultural producers to combine could not be "deemed to authorize any combination or conspiracy *with other persons.*"

> the qualifying procedure for which Section two provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under Section one of the Sherman Act for the purpose of punishing such conspiracies. 308 U.S. at 206.

No resort whatsoever to the legislative history was made or needed in *Borden* to find that Capper-Volstead's procedure was not intended to prevent the antitrust laws from being applied to a market conspiracy between a cooperative and outsiders.

It is against this backdrop that we turn to an analysis of the legislative history. This history shows conclusively that Section 2 was not designed to be an additional weapon in the arsenal of antitrust remedies against cooperatives acting alone, but was intended by Congress to be a substitute for them.

2. The Legislative Development

The Capper-Volstead Act of 1922 (7 U.S.C. §§ 291, 292) substantially follows the provisions of two bills—H.R. 13931 and H.R. 2373—introduced in the 66th and 67th Congress, respectively. The legislative history of these bills is extensive and illuminating beyond measure on the critical issue which confronts this Court. It is true, as always, that different Congressmen and Senators expressed varying points of view. But in sharp contrast to Clayton Act discussions, the debates here were sharply focussed on clear issues, and the actions in each house—unlike many congressional debates—clearly resolved the points at issue. A study of the legislative history in its entirety impels the conclusion that the remedy provided by Section 2 of Capper-Volstead was intended to be exclusive in

all cases involving monopolization or restraints, otherwise cognizable under the Sherman and Clayton Acts, when charged against a cooperative acting apart from combination or conspiracy with outsiders. This intent appears with remarkable consistency, as we shall show below, in the design of the draftsmen, the purpose of the sponsors and the understanding of both advocates and opponents of Capper-Volstead.[6] And, as we shall show in part II of this brief, this interpretation of the Capper-Volstead Act is necessitated by the practical realities of farmer cooperative activity.

In view of the importance which we attach to the legislative history of Capper-Volstead, we have set forth in the Appendix a running summary which accurately conveys the essence of the debates and reports, the issues and their resolution. We will refer to representative portions of that Appendix as, e.g., (App. 7a).

a. *Outline of Congressional Action*

In broad outline, Capper-Volstead was the product of sharp legislative conflict in two consecutive Congresses over the perplexing problem of how to resolve farmer cooperation with competition. It was intro-

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[6] "The unanimity with which foes and supporters of the bill spoke of its aims * * * permit use of the debates in interpreting the purpose of the act." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 493, n. 15 (1940). The "exposition of the bill on the floor of Congress by those in charge of or sponsoring the legislation" often is a reliable guide to legislative meaning. *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 463, n. 8 (1937). The "fact that throughout the consideration of this legislation there was common agreement in the debate as to the great purpose of the act, may properly be considered in determining what that purpose was and what were the evils sought to be remedied." *Federal Trade Commission* v. *Raladam*, 283 U.S. 643, 650 (1931).

duced as H.R. 13931 by Congressman Volstead and as S. 4344 by Senator Capper in the 66th Congress in a form similar to the final version (App. 7a). The House passed it with minor amendments but the Senate substituted the Federal Trade Commission for the Secretary of Agriculture in Section 2, and added a provision prohibiting monopoly (App. 19a). A conference committee was unable to resolve House-Senate differences before Congress adjourned (App. 7a, 20a, 21a, 32a, 47a-48a). The bill was reintroduced in the 67th Congress as H.R. 2373 and S. 983 in substantially the form in which it became law. After passage by the House the Senate Judiciary Committee proposed an amendment to eliminate Section 2 in its entirety and substitute a prohibition against monopoly (App. 26a). The bill was passed only after extensive debate in the Senate had culminated in overwhelming rejection of the antimonopoly amendment (App. 47a) as well as the amendment to replace the Secretary of Agriculture by the Federal Trade Commission (App. 46a).

Capper-Volstead, like Clayton, arose out of concern for the perennial problem of low prices for farm products. The individual farmer was recognized to have little bargaining power when, in the language of the House Reports (App. 9a, 20a),

> he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price.

The economic power which the bill intended to confer on farmers could come about only if the cooperative

could, in the words of Senator Capper, "control and handle a substantial part of a given commodity in the locality where it operates" (App. 31a). In this way, Representative Volstead observed, cooperatives enable farmers to maintain "a much higher average of prices" (App. 47a-48a). Section 6 of the Clayton Act had proven to be too indefinite and ambiguous an exemption to afford adequate assurance to farmers that their cooperatives would not be harassed by antitrust attacks (App. 8a-9a, 18a-19a). The threat of criminal prosecution in particular, which had long beset farm organizations and deterred farmers from joining them, had to be dispelled (App. 23a-25a, 29a-30a). Some sort of regulation to prevent both persecution of cooperatives and abuse by them had to be devised. The answer is found in Section 2 of the Capper-Volstead Act.

b. *The Drafting of Section 2*

The origin of Section 2 of the Capper-Volstead Act reveals much about the intent of its sponsors and supporters. As explained by House Report 939 of the 66th Congress (App. 8a) and House Report 24 of the 67th Congress (App. 20a), "Section 2 makes applicable to these associations in a modified form the provisions of the Clayton Act." Congressman Volstead told the House that because (App. 12a)

> we are granting these associations much larger powers than they had under the Clayton Antitrust Act, it was thought that they ought to be put under some supervision, because there has been complaint against some of these associations, and it was for that reason section 2 was drawn. That section is modeled largely upon some of the provisions of the Clayton Antitrust Act.

And Senator Capper stated that the "complete and adequate remedy" provided in Section 2 was (App. 31a)

> taken from the Federal Trade Commission Act, and the Secretary of Agriculture can, as the Federal Trade Commission has repeatedly done, issue orders to cease and desist from specific acts.

In order to appreciate these remarks of the draftsmen, reference must be made to the original Clayton Act, 38 Stat. 730, and Federal Trade Commission Act, 38 Stat. 719, as they existed at the time of Capper-Volstead. Such a study discloses that the procedure delineated in Section 2 of the Capper-Volstead Act was a composite patterned on the provisions of (1) Section 11 of the Clayton Act (15 U.S.C. § 21) and Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), which in their pertinent procedural provisions are substantially identical, and (2) Section 15 of the Clayton Act (15 U.S.C. § 25), which is virtually identical to the procedure of Section 4 of the Sherman Act (15 U.S.C. § 4). Because the importance of this derivation goes to the heart of the issue presented to this Court, we set forth in the attached table a representative comparison of these statutes.

This comparison illustrates several revealing points:

(1) Section 2 of Capper-Volstead gave the Secretary of Agriculture jurisdiction over farmer cooperatives in much the same manner as Section 11 of the Clayton Act had allocated jurisdiction to the Interstate Commerce Commission for common carriers, the Federal Reserve Board for banks, and the Federal Trade Commission for "all other character of commerce." 15

COMPARISON OF SECTION 2 OF THE CAPPER-VOLSTEAD ACT WITH SECTIONS 11 AND 15 OF THE CLAYTON ACT

Capper-Volstead Act, Section 2	*Clayton Act, Section 11 plus Section 15*
(1) If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof.	(1) *Section 11.* That authority to enforce compliance with sections two, three, seven, and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations, and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows: Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven, and eight of this Act.
(2) He shall serve upon such association a complaint stating his charge in that respect.	(2) § *11.* It shall issue and serve upon such person a complaint stating its charges in that respect.
(3) If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the rice of any agricultural product is unduly enanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade.	(3) § *11.* If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations.
(4) On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing.	(4) § *11.* If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. • • • Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review on such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside.

(5) Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable and may make rules as to pleadings and proceedings to be had in considering such order.

(6) The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts but either party may adduce additional evidence.

(7) The Department of Justice shall have charge of the enforcement of such order.

• • •

Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable . . .

(8) After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy.

of the commission or board be set aside.

(5) § *11.* Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board.

(6) § *11.* The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearings in such manner and upon such terms and conditions as to the court may seem proper.

• • •

(7) *Section 15.* That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited.

(8) § *15.* When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make temporary restraining order or prohibition as shall be deemed just in the premises.

U.S.C. § 18. The Secretary's authority, however, was broader, more-inclusive. Instead of being limited to enforcing Clayton Sections 2, 3, 7 and 8, the mention in Section 2 of Capper-Volstead of "monopolization or restraint of trade" clearly referred to all provisions of the Sherman and Clayton Acts,[7] as modified by the "undue enhancement" clause.

That Congress intended to displace FTC jurisdiction over cooperatives and substitute the Secretary of Agriculture cannot be disputed. In the 66th Congress the Senate amendment to remove the Secretary from Section 2 and retain Federal Trade Commission authority instead (App. 20a) was one of the two points on which House-Senate conferees were unable to agree prior to adjournment (App. 21a, 48a). In the succeeding Congress, the Senate again debated the choice between these two agencies and voted to reject the FTC (App. 46a).

(2) Section 11 of the Clayton Act (as well as Section 5 of the Federal Trade Commission Act) provides for the issuance of a cease and desist order by the agency against the violation complained of. In similar language, Section 2 of Capper-Volstead gives the Secretary of Agriculture authority to order cooperatives to cease and desist. The Secretary's authority, however, is more sweeping than that of the FTC. Upon finding that monopolization or restraint of trade has unduly enhanced prices, the Secretary must issue an order not to lower high prices but to "cease and desist

[7] The Sherman Act by its title and provisions was the "Act to protect trade and commerce against unlawful restraints and monopolies." 26 Stat. 209. The Clayton Act by its title and provisions was to "supplement existing laws against unlawful restraints and monopolies and for other purposes." 38 Stat. 730.

from monopolization or restraint of trade." 7 U.S.C. § 292. That very language of Section 2 was adopted as an amendment by the Senate expressly to deal with the problem of monopolization and restraint by cooperatives (App. 43a-44a).

(3) Court enforcement of orders issued under Section 11 is secured by application to the court of appeals, whose authority is limited to affirming, modifying or setting aside the FTC, ICC or FRB order on the basis of the agency record. It is here that Capper-Volstead's resemblance to Section 11 (and Section 5 of the Federal Trade Commission Act) ceases and the similarity to Section 15 begins. For court enforcement of Capper-Volstead orders must be sought in the district court. There, as in Section 15 of the Clayton Act, the proceedings are much more akin to a trial de novo than to appellate court review. Unlike Section 11 cases, where no provisional relief may be sought, Section 2 of Capper-Volstead authorizes the district court to grant temporary injunctions just as in Clayton Section 15. Instead of the agency findings being "conclusive" as in Section 11 (and Section 5), the findings of the Secretary of Agriculture are only "prima facie evidence" and both the Justice Department and the cooperative "may adduce additional evidence." 7 U.S.C. § 292. After the trial, the district court is not limited to "affirming, modifying or setting aside" the order of the Secretary, but may in a manner similar to Section 15 enter "such other decree as the court may deem equitable." 7 U.S.C. § 292.

The significance of this language is far-reaching. It gives to the Department of Justice the right to invoke the full arsenal of antitrust remedies against

monopoly. This is exactly why Senator Capper offered an amendment to add the language

> or enter such other decree as the court may deem equitable.

As explained by Senator Kellogg in support of the amendment (App. 40a)

> I said that if the Secretary of Agriculture found that the restraint of trade and the monopoly had gone to such an extent that the price of agricultural products was unduly enhanced, he could make an order against the restraint of trade and the monopoly, and if he brought a suit to enforce that, the court could apply any remedy against that particular monopoly and restraint of trade that it could now apply under the Sherman Act—that is, in the same form.

The amendment was adopted (App. 40a).

The cumulative effect of the foregoing comparison can now be appraised. In 1914, the Clayton Act, in Sections 11 and 15, had established a "dual system of enforcement." Under Section 11, the Federal Trade Commission or other specialized agency could conduct proceedings directed at a cease and desist order against violation of substantive sections of the Clayton Act. Agency findings, if supportable, were to be conclusive on court of appeals review. In Section 15, an alternative remedy for Clayton Act violations was provided. The Department of Justice, by an original action in district court, could seek a wide range of equitable antitrust relief. In 1922, the Capper-Volstead Act combined these alternatives for agriculture. In Section 2, Congress amalgamated the dual remedies of Section 11 and Section 15 into a single cohesive and

consecutive procedure to rule all cases involving monopolization or restraint of trade by cooperatives acting alone. Why Congress adopted this special procedure for cooperatives is made clear by the legislative reports and debates.

In studying these debates, it is important to bear in mind the alternative to the interpretation which we believe history urges. If Capper-Volstead is not construed as the exclusive vehicle by which antitrust standards are to be imposed on cooperatives acting alone, the alternative is that it is only a supplementary remedy. Such an alternative has peculiar consequences. If a cooperative, without outsiders, monopolizes or restrains trade, it becomes liable to a triple enforcement scheme: the Department of Justice by criminal or equity action in district court, the Federal Trade Commission by agency proceedings subject to court of appeals review, and the Secretary of Agriculture by agency proceedings followed by Justice Department equity enforcement in district court. Under this system Capper-Volstead, born of a desire to aid farmers by bolstering Section 6 of the Clayton Act, would actually mark a retreat from Clayton by adding another method of proceeding against cooperatives. No other segment of our economy is subject to antitrust attack from so many sides. No one familiar with the Act's history can contend that this triple-enforcement scheme resembles even remotely the purpose of the 67th Congress.

c. The Intent of Congress

(1) Regulated Monopoly vs. Antimonopoly

Hardly anyone in the 66th or 67th Congress argued against cooperatives or the need for joint action by farmers. The pivotal issue, instead, was monopoly. Was the economic power of combining farmers to be stopped short of monopoly? Or was monopoly a desirable goal so long as regulation was available to prevent its abuse? It was this very conflict which the Senate and House conferees had been unable to resolve in the 66th Congress. Senator Walsh, Chairman of the Senate Judiciary Committee, later told his colleagues that "the Senate conferees insist[ed] upon that amendment proposed by them, to the effect that nothing in the act was to be deemed to authorize the creation of or the attempt to create a monopoly" (App. 32a). Representative Volstead, Chairman of the House Judiciary Committee, told the same story. He stated to the House that its bill in the 66th Congress "was so amended in the Senate that in my view it would defeat its purpose, and it consequently failed of passage at that time" (App. 48a).

The monopoly issue recurred in the 67th Congress when the Senate Judiciary Committee recommended that the House bill be amended to delete Section 2 and add to Section 1 the following amendment (App. 26a):

> Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the act entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, on account of unfair methods of competition in commerce.

Chairman Walsh stated that "the sole matter of difference . . . the sole question for determination" was "whether we shall authorize the setting up of monopolies under the protection of this bill" (App. 32a). The choice was that "under the House bill . . . there may be a monopoly, but subject to regulation," whereas "the Senate bill forbids monopoly utterly" (App. 32a). When asked what rights the Senate Committee bill would give to cooperatives "that they do not now have under existing law," Chairman Walsh explained the difference between Sections 1 and 2 of the Sherman Act and concluded (App. 33a):

> it is our purpose to relieve these associations from all possible risk of being prosecuted under section 1 of the act, but not under section 2.

But supporters of the House bill pointed up the inadequacy of any statute that would legalize a combination under Section 1 of the Sherman Act but not under Section 2. Senator Sterling, a member of the Judiciary Committee, astutely observed (App. 42a)

> that the same evidence to be adduced in a charge that there has been a combination or contract or conspiracy in restraint of trade may be adduced in support of a charge that there is a monopoly or that there has been an attempt to monopolize.

As a result, he concluded (App. 42a):

> A man who desires to prosecute a combination or association of farmers has only to say, "There is here an attempt to create a monopoly" and he produces the evidence; and he would have produced the same kind and class of evidence had the charge been that there had been an agreement in restraint of trade and commerce.

There was no illusion in either House as to the practices which would inevitably flow from authorizing cooperatives to monopolize. It was recognized and not disputed that cooperatives could not combine with outsiders. As stated by Representative Volstead (App. 22a):

> If these organizations should combine with corporations not organized as provided in this bill to thus monopolize or restrain trade, they will become subject to the Sherman Antitrust Act just the same as any other combination or corporation.

But exclusive dealing arrangements with middlemen (App. 15a, 16a-17a), storing products to force higher prices (App. 18a), agreement among cooperatives not to sell to merchants who resell at unduly low prices (App. 22a) and exclusion or coercion of independent producers (App. 16a-17a, 42a-43a) were recognized by both supporters and opponents of the legislation as conduct which could be attacked under the House bill only if it resulted in unduly enhanced prices. In fact it was directly to prevent monopolistic cooperatives from excluding independent producers from business that Senator Walsh offered an amendent to require a cooperative to admit to membership any qualified person (App. 42a). The Senate rejected that proposal (App. 43a).

The fear of monopoly voiced by opponents of Capper-Volstead was almost always illustrated in terms of milk. It was pointed to by the Senate Report as the prime example of the need for an antimonopoly provision (App. 27a). A prohibition against monopoly, explained Chairman Walsh, would be "a feature that is of no consequence whatever to the producer of the

ordinary line of farm products" such as grain, cotton and potatoes (App. 33a). It would affect only those articles produced within limited areas, such as raisins, or "that must be produced within a limited distance from those centers in which they are consumed," like milk. In such cases, "the prohibition of monopoly is a matter of very great consequence" (App. 33a). The example of a "hypothetical" monopolistic association composed of milk producers in "the country tributary to the city of Washington" (App. 34a-35a), or formed by the merger of a Maryland association and a Virginia association (App. 35a-36a) was frequently discussed (App. 14a-15a, 37a-38a, 39a, 47a). Chairman Walsh alluded to the high price of milk then prevailing in Washington (App. 36a-37a)

> for the purpose of showing that outrageous exactions might be made through the organization of such an association as the Senate substitute seeks to prevent, and the advocates of the bill as it passed the House insist should be permitted to operate.

But the possibility of a monopoly in milk was considered by supporters of the House bill to be an insufficient reason for continuing to subject farmer organizations to antitrust prosecution. Thus Senator Kellogg, floor leader for proponents of the House bill (App. 28a), opposed the Committee's antimonopoly amendment because it would (App. 30a)

> hold the sword and the threat of the Sherman Act over all the farming activities of the country, and subject them to unreasonable prosecution and harassments in order to protect the public in a few articles. This bill furnishes ample protection against undue exactions in those articles which it is claimed may be monopolized.

The trouble with the amendment, Senator Kellogg indicated, was that it would subject a cooperative to prosecution for being a "technical monopoly" without regard to "whether it has been of benefit to the public or not" (App. 30a).

It was on the basis of this sharply defined debate on monopoly that the Senate in the 67th Congress reversed its stand of the 66th and by a vote of 56 to 5 rejected its own Judiciary Committee's amendment which, if adopted, would have authorized prosecutions such as the one now confronting this Court (App. 47a). Upon the defeat of that amendment, the bill was returned to the House where Representative Volstead recommended concurrence in the Senate's minor amendments (App. 47a-48a).

(2) The Meaning of Exemption

The decision of the 67th Congress to permit monopoly by agricultural cooperatives did not signify liberation from antimonopoly control. No one advocated that cooperatives be removed from the Sherman and Clayton Acts and left alone. "The farmers themselves" were said to recognize that "there must be some sort of public control" (App. 23a). As summarized by Senator Borah, a member of the Judiciary Committee (App. 18a)

> this measure. . . . gives them a status of their own, fixes a different method of proceeding, and absolutely deprives the court, in the first instance, of examining into the question of whether or not they have violated the law. . . . it is proposed not to exempt them and leave no remedy at all, but to exempt them and provide another tribunal before which they can have their hearings.

Representative Volstead similarly observed that (App. 12a)

> as we are granting these associations much larger powers than they had under the Clayton Antitrust Act, it was thought that they ought to be put under some supervision, because there had been complaint against some of these associations, and it was for that reason section 2 was drawn.

The evil that proponents of Capper-Volstead wanted to guard against was that a monopoly by farmers might raise prices too high. The House Reports in both Congresses stated that Section 2 "gives the Secretary of Agriculture power to prevent these associations from exploiting the public" (App. 8a, 20a). And Senate Report 236 of the 67th Congress stated that Section 2 of the House bill had as its purpose (App. 27a)

> the alleviation of the evils of monopoly, or those that may follow from authorized combinations, by the granting of something like supervisory control to the Secretary of Agriculture.

These references were to the fact that Section 2 limited monopolistic cooperatives at the point at which they unduly enhanced prices. A cooperative which the Secretary of Agriculture found to have crossed that line was to be subject to the same equitable sanctions as any other monopoly under the antitrust laws (App. 40a, 43a-44a).

This special antitrust procedure for cooperatives struck at the principal evil of monopoly. As explained by Senator Kellogg, leader of its proponents in the Senate, Section 2 contained (App. 28a)

> features for the protection of the public in the event that any restraint of trade or monopoly unduly enhances prices, for, after all, the principal

> object of the Sherman Act is to prevent great organizations of capital and business from getting control of the business of the country and enhancing prices to the damage of the public.

Because it thus outlawed the ultimate objective of restraints of trade, the proponents of Capper-Volstead did not look upon it as giving farmers a special privilege. Chairman Volstead made this very point when he described the remedy provided in Section 2 as giving "to these organizations a status of equality with other business concerns, and that is all the farmers ask" (App. 25a). He explained this "equality" by noting that (App. 25a)

> in the event that there is a complaint against them they will not be subject to criminal prosecution if their organization is permitted by this bill, but an investigation will be had before the Secretary of Agriculture, who is given power to deal with the matter. Corporations are very seldom indicted but proceeded against in a civil action substantially the same as we authorize against these associations.

The fact that farm cooperatives would be subject to special antitrust proceedings which could culminate in the application of full Sherman Act relief in part explains the statement in House Report 24 of the 67th Congress that (App. 21a)

> In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them.

Any notion that this language was meant to imply that cooperatives were to be subject to the same antitrust proceedings as are business corporations would be clearly in error. In debate, Congressman Mills took issue with this statement of the Report, showed how the authorization of Section 1 was far broader than that conferred on any corporation, and concluded that (App. 22a):

> It is possible, if it is the intent of the framers of this bill, to simply permit the formation of an association or corporation for the purpose of marketing, to say specifically in this bill that the other provisions relating to what these associations shall do after they are formed shall be subject to the provisions of the Sherman Antitrust Act.

Moreover, if Capper-Volstead did no more than place farmers on a par with corporations, it would have been meaningless legislation since Section 6 of the Clayton Act, whatever its shortcomings as an exemption statute, had already done this.

The legislative history makes it plain that both supporters and opponents of the bill agreed that the purpose of Section 2 was to preclude antitrust prosecution of cooperatives by any other means. Opponents objected that the bill would "take from the courts the right of initial proceeding" against cooperatives (App. 13a) and place the decision whether or not to prosecute in the hands of the Secretary of Agriculture, "the guardian angel of the farmers of this country" (App. 11a). Letting the Secretary "determine whether or not a violation in restraint of trade or unfair dealing is had" instead of maintaining the jurisdiction of the antitrust laws, they said, would serve only to avoid the scrutiny and evade the standards which those laws

require (App. 13a-14a). As stated by Senator King, a member of the Judiciary Committee, it would deny (App. 29a-30a)

> the right of the Attorney General to initiate proceedings, even though he should believe from uncontrovertible evidence that a monopoly stupendous in character and oppressive in results exists by reason of combinations of the character contemplated.

The opponents were not exaggerating the consequences of the bill. House Report 24 in the 67th Congress stated that the "bill directs the Secretary of Agriculture to supervise these associations," because "his department is thoroughly familiar with the needs and difficulties under which [these associations] always have a struggle" (App. 20a). Congressman Sumners, a member of the Judiciary Committee, advised the House (App. 24a):

> It is a choice between giving the Secretary of Agriculture, the Department of Commerce, or the Department of Justice original supervision. The farmers prefer the Secretary of Agriculture, and I see no reason why the public should object to his designation.

The greater competence of the Secretary of Agriculture to deal with farmers was discussed at length (App. 20a, 29a, 45a-46a). The importance of having the Secretary act before the Attorney General would be permitted to take charge in court was carefully explained by Senator Kellogg (App. 28a-29a):

> . . . the Attorney General has not the machinery to study these cooperative associations, to find out the cost of production, the cost of selling, the reasonable prices to the consumers, and various

other elements which it is easy for the Secretary of Agriculture to find out.

It may be said, therefore, that before such associations can be prosecuted under the Sherman Act for any restraint of trade or monopoly, whether it is a mere technical monopoly or not, the Secretary of Agriculture must investigate and make a finding that the cooperative association is in restraint of trade or is a monopoly and is unduly enhancing prices.

The Attorney General could, however, "prosecute suits instituted by the Secretary of Agriculture" (App. 30a).

The conflicting attitudes expressed above were reflected in the actions that Congress took. The Senate committee's recommendation that Section 2 be deleted and replaced by Senator Walsh's antimonopoly amendment (App. 26a), designed to retain the power of the Attorney General to proceed against monopolistic cooperatives, was rejected decisively by the Senate (App. 47a). In addition, the proposal to replace the Secretary of Agriculture by the Federal Trade Commission (App. 17a, 45a-46a) in the regulatory scheme of Section 2 was rejected by voice vote (App. 46a). The votes on these two issues by the Senate in the 67th Congress, reversing the positions that chamber had taken in the prior Congress (App. 20a), brought it into accord with the House and enabled Capper-Volstead's exclusive procedure for regulating cooperatives to become law.

This then is the meaning of exemption. The Capper-Volstead Act was designed to free the collective marketing activities of farmers from all possibility of antitrust prosecution, particularly criminal, by the Department of Justice. The fact that such activities

might monopolize or restrain trade was acknowledged. But Congress, regarding the undue enhancement of prices as the ultimate danger at which the Sherman Act was aimed, vested the Secretary of Agriculture with exclusive original jurisdiction to act if monopoly or restraint by a cooperative raised prices unduly. If the Secretary found that it did, the complete arsenal of equitable relief available under the Sherman Act could then be brought to bear by the Attorney General in seeking to enforce the order of the Secretary of Agriculture in a district court. Thus, the most feared evil of Sherman Act monopoly was forbidden and full Sherman Act relief was provided. For this reason, a declaration that the antitrust laws were not to apply to the cooperative activities of farmers would have been inconsistent with Capper-Volstead's purpose.

(3) Vertical Integration

To enable farmers to raise prices and better their own lot in the market, Section 1 of the House bill specifically authorized vertical integration of the entire marketing process under farmer control. Consequent elimination of the middleman was an open objective (App. 10a, 11a, 24a). As spelled out by a member of the House Judiciary Committee (App. 10a):

> Cooperative farmers' organizations will bring producers and consumers closer together. The excessive charges of unnecessary middlemen will be eliminated, and the cost of marketing, manufacturing, and distributing farm products will be greatly reduced. The producers and consumers will share equitably in the profits derived from cooperative business organizations among farmers. Prices will be stabilized . . .

Opponents objected that the bill not only allowed cooperatives to take the form of monopolies in production "but in 'processing', in handling, and in placing the products, raw or finished, upon the market" as well (App. 18a). Senator Capper declared that this was necessary to achieve the bill's goal since "no association can efficiently operate that does not control and handle a substantial part of a given commodity in the locality where it operates" (App. 31a). If farmers did not so market collectively, he explained, "they cannot market at all" but must usually turn their products over to middlemen.

Even the opposition to the bill took no issue with vertical integration by cooperatives. Said Senator Walsh, Judiciary Committee Chairman (App. 34a):

> . . . both bills would authorize the organization of associations among farmers to make butter of their product or to make cheese of their product or to make condensed milk of their product, and to put the product on the market.

Such ends were desirable, he indicated (App. 38a-39a):

> We want to allow a lot of farmers, instead of bringing their milk into a cheese factory run by private capital, selling their milk to the corporation which runs that cheese factory, to be permitted to associate themselves together—which, of course, would eliminate competition between themselves—build their own cheese factory, bring their milk to that cheese factory, sell the cheese and divide the profits. That is what this bill is for.

In fact it was because of this authorization that Senator Walsh was so anxious to forbid monopoly (App. 39a):

> Let us turn again to the milk producers in the State of Virginia and in the State of Maryland. They do not resort to any unfair practices at all. They simply organize themselves, and they all unite in one association under the protection of this act; they set up their own distributing system in the city of Washington.
>
> Of course, the private distributors must go out of business. They can not any more get any milk from anybody, at least unless they go beyond the territory which would ordinarily supply the city of Washington, and, of course, they must compete under disadvantageous circumstances, and they would naturally fall.

But the 67th Congress chose not to bar such an eventuality unless it resulted in unduly enhanced prices (App. 47a). Accordingly, cooperatives were authorized, subject to Department of Agriculture supervision, to integrate vertically and supplant the private distributor.

In 1922, the Capper-Volstead Act authorized by Section 1 the vertical integration of farmer cooperatives which are permitted to monopolize the marketing of their product, subject to the standards of Section 2. Twenty-eight years later this authorization was reaffirmed.

C. Capper-Volstead Reflected: The 1950 Amendment to Section 7 of the Clayton Act

In 1950, Section 7 of the Clayton Act was amended to bring within its coverage acquisitions of assets having stated anticompetitive effects. 64 Stat. 1125, 15 U.S.C. § 18. Consistent with, and at least partly in recognition of the intent and scope of the Capper-Volstead Act, two separate provisions of that amend-

ment serve to exclude acquisitions by Capper-Volstead cooperatives from the ban of Section 7. Amended Section 7 provides in the first paragraph that

> no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation. . . .

and in the last paragraph that

> Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

1. "Subject to the Jurisdiction of the Federal Trade Commission"

The first part of the amendment excludes corporations which are not subject to Federal Trade Commission antitrust jurisdiction because those corporations have already been placed under the supervision of a specialized administrative agency. In the case of agriculture, as we have previously seen, the Capper-Volstead Act was specifically drafted so as to remove farmer cooperatives from the Sherman and Clayton Act jurisdiction of both the Department of Justice and the Federal Trade Commission, and an amendment to restore the Commission's role vis-a-vis cooperatives was expressly rejected by the Senate in the 67th Congress (App. 46a). For this reason alone, cooperatives

under the jurisdiction of the Secretary of Agriculture are not "subject to the jurisdiction of the Federal Trade Commission" and are thus not answerable to the asset acquisition provisions of Section 7 of the Clayton Act.

2. "Authority Given by the Secretary of Agriculture"

But the amendment went further and by its last paragraph affirmatively excluded transactions "consummated pursuant to authority given by" any of the designated agencies, "under any statutory provision vesting such power" in the agency. The seventh listed agency is the Secretary of Agriculture. Since no United States statute confers express authority on the Secretary of Agriculture to give advance approval to an acquisition of assets, inclusion of the Secretary is meaningless without reference to the Capper-Volstead Act. That Act confers express authority on farmer cooperatives to make contracts necessary to carry out any of the vertically integrated functions of marketing their products. Contracts to acquire assets to be used in carrying on such functions are manifestly included. Where any such acquisition results in monopolization or restraint of trade by the cooperative with the effect of unduly enhanced prices, it must be challenged by the Secretary of Agriculture under Section 2 of the Capper-Volstead Act. Accordingly, asset acquisitions by farmer cooperatives are in a very real sense transactions which are consummated under the authority given by Section 1 of the Capper-Volstead Act itself, subject to challenge by the Secretary of Agriculture under power vested in him by Section 2 of that Act.

That this is the precise reason why the Secretary of Agriculture was included in the last paragraph of Section 7 is demonstrated by recourse to the legislative history of the 1950 amendment. The original text of H.R. 515, the bill introduced in the First Session of the 80th Congress to amend Section 7 of the Clayton Act, contained no reference to transactions under the authority of the Secretary of Agriculture. Its last paragraph mentioned only the Civil Aeronautics Authority, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, Securities and Exchange Commission and Surplus Property Board. In the course of hearings before the House Judiciary Committee, however, compelling testimony regarding agricultural cooperatives was given by Charles W. Holman, Secretary of the National Cooperative Milk Producers Federation. Hearings Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives (80th Cong., 1st Sess.) on H.R. 515, pages 101-104. Holman stated that his organization represented 83 farmer-owned and farmer-controlled dairy cooperatives collectively owning approximately 800 dairy plants, and that he was appearing in opposition to H.R. 515 insofar as it might apply to acquisitions of marketing facilities by cooperatives subject to the Capper-Volstead Act. Such application, he told the Committee, "would stifle the normal growth of our farmer-owned dairy cooperative marketing associations" (Hearings, p. 101). Holman traced the history of the application of the antitrust laws to agricultural cooperatives, stating that the Capper-Volstead Act was "in effect an amendment to the antitrust statutes" which "authorizes and sanctions the elimination" of competition among farmers

"as well as setting up an agency for prevention of monopolistic tendencies contrary to public interest" (Hearings, p. 103). He gave several examples, including (p. 103):

> Let us take the case of a cooperative milk marketing association which is exercising the dual function of distributing milk either wholesale or retail or both, and acting as a bargaining agent for its members. In doing so it supplies a number of dealers on the market with all or part of their milk and cream needs. Let us suppose that one of the dealers to whom the cooperative has been furnishing milk desires to retire from business and offers to sell his plant and facilities. In order to guarantee an assured continued outlet for the milk of its members, the cooperative might purchase these assets, but under H.R. 515 might be held in violation of the Clayton Act.

Holman then asked the Committee to amend H.R. 515, stating (pp. 103-4):

> The legislation proposed to this committee may not be aimed at agricultural cooperatives. Yet the bill, as drawn, is subject to interpretations which would nullify rights accruing to farmer cooperatives under the Capper-Volstead Act, would wipe out the power of the Secretary of Agriculture, a technically informed and naturally understanding agency, to determine whether cooperative activities have begun to run counter to public interest, and relegate farmers to the conditions of uncertainty which prevailed prior to the passage of the act.

Following the hearings at which Mr. Holman testified, H.R. 515 was amended by the Committee and

reintroduced as H.R. 3736. The Committee's report stated (H. Rep. 596, 80th Cong., 1st Sess., p. 1):

> The bill was originally introduced as H.R. 515. Extensive hearings were held thereon by Subcommittee No. 2 of the Judiciary Committee. Amendments were adopted to H.R. 515 and the bill as amended reported as H.R. 3736.

Among the amendments made by the Committee was the addition of the Secretary of Agriculture to the agencies listed in the last paragraph of Section 7.

H.R. 3736 did not reach the floor in the 80th Congress, but in the 81st Congress, a substantially identical bill, H.R. 2734, was introduced. It too included the Secretary of Agriculture in the last paragraph of Section 7. This feature was not discussed in debate (95 Cong. Rec. 11484-11507; 96 Cong Rec. 16433-57, 16498-16508). The Senate Report merely paraphrased the last paragraph's language (S. Rep. 1175, 81st Cong., 2nd Sess., p. 2). But the Report of the House Committee on the Judiciary, the Committee which had heard Holman's testimony and thereafter amended H.R. 515, stated (H. Rep. 1191, 81st Cong., 1st Sess., p. 6):

> The last paragraph of section 7 is new. It simply provides that provisions of the bill should not apply to corporations coming under the jurisdiction of ICC, CAA, FCC, FPC, SEC, and the Secretary of Agriculture. These agencies already have jurisdiction over these corporations, and there is no disposition to change the present arrangement regarding them.

Against this background, it is clear that the Capper-Volstead Act was deemed by Congress to confer the authority referred to in the last paragraph of Section

7. This conclusion gives meaning to Section 7's otherwise inexplicable reference to the Secretary of Agriculture in accord with the canon that a statute should be "so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Ex Parte Public National Bank*, 278 U.S. 101, 104 (1928). The last paragraph of Section 7 grouped seven specialized administrative agencies, each having its own individual statutory procedures, into one brief descriptive sentence. The plain and salutary purpose of the paragraph was to preserve the exclusive merger and acquisition review authority which had previously been vested in those agencies. That purpose should not be thwarted in the case of agriculture simply because the few words the draftsmen used to summarize the techniques of agency review do not describe precisely all seven separate statutory schemes.

3. Incipient Violation of Inapplicable Law

Of paramount importance in any appraisal of amended Section 7's effect on Capper-Volstead cooperatives is the question of the antitrust objective involved. Section 7 of the Clayton Act outlaws those acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." The avowed purpose of Section 7, "as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." S. Rep. 1775, 81st Cong., 2d Sess., pp. 4-5. But the Capper-Volstead Act, as we have seen, permits farmer cooperatives to monopolize and restrain trade without fear of Sherman Act prosecution as

such, subject only to initial proceedings by the Secretary of Agriculture. Accordingly, it would hardly make sense to measure the anticompetitive effects or tendencies of a cooperative's acquisition by the standards of Section 7 of the Clayton Act when, fully ripened, those same effects would not "justify a Sherman Act proceeding." In fact, because of the authorization of cooperative monopoly by Capper-Volstead, the vertical acquisition of marketing facilities by any substantial cooperative is likely to violate the competitive standards of Section 7. The Holman testimony indicated that this was a matter of real concern to cooperatives. Such a result could only be attained, however, by applying Section 7 of the Clayton Act, as amended, in a manner contrary to its first paragraph, its last paragraph, and the language of Section 1 of the Capper-Volstead Act.

D. The Legal Significance of Capper-Volstead

The Capper-Volstead Act, in both procedural and substantive respects, substantially modified the application of the antitrust laws to agricultural cooperatives which act apart from combination or conspiracy with outsiders. Substantively, it immunized monopolization or restraint of trade unless prices were unduly enhanced. Procedurally, it eliminated the dual system of enforcement by the Federal Trade Commission and the Department of Justice and substituted an exclusive unified procedure by which the Secreary of Agriculture could initiate, and the Department of Justice could enforce, antitrust action against cooperatives.

By these modifications the 67th Congress tailored a system of limited antitrust enforcement to the peculiar needs of a segment of the economy in which

competition as such is a curse. In sum, the purpose of Capper-Volstead as well as its method are unique and unprecedented. They stand in bold contrast to special legislation of prior and later Congresses in which this Court, after careful study of the legislative history, has concluded that no modification of substantive law was intended.

In *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196 (1945), this Court ruled that Section 5 of the Webb-Pomerene Act, a product of the 65th Congress, did not preclude the Department of Justice from instituting antitrust proceedings against export associations prior to investigation by the Federal Trade Commission. Although Section 5 contained no such restriction, petitioners argued that it was implied from the structure of the Act. This Court, however, found no such implication in the words, the setting or the legislative history of Webb-Pomerene. The authority conferred on the Federal Trade Commission was confined simply to investigating, recommending and reporting; and its recommendations were to be referred to the Attorney General "for such action thereon as he may deem proper." The Commission could make no order, enforce no law, impose no prohibition against violations. It could do no more than "render a useful service in bringing violations to the attention of the Department of Justice" or show "that resort to the courts is unnecessary." 325 U.S. at 208. Further, the Court found nothing in the "legislative history to show a Congressional purpose to restrict the authority of the United States to maintain suits for every kind of violation of the antitrust laws." 325 U.S. at 210. It concluded that the absence of any "extended discussion of the matter was in itself per-

suasive evidence" of no purpose to repeal any part of the Sherman Act, and that (325 U.S. at 211)

> Congress's clear purpose to insure continued and vigorous application of the antitrust laws to domestic restraints of trade, notwithstanding the Webb-Pomerene Act, is shown by the Committee Reports as well as by statements of the sponsors of the legislation on the floors of Congress, and is a strong indication that there was no thought of depriving the Attorney General of any of his powers to prosecute antitrust suits.

Juxtaposing this analysis of the Webb-Pomerene Act with what we have seen in Capper-Volstead offers a powerful contrast indeed. "Extended discussion" of the entire monopoly problem and of "depriving the Attorney General" of his power to initiate Sherman Act prosecution of cooperatives was at the very heart of debate in two Congresses. By its votes on specific proposals, the 67th Congress specifically indicated its intent to modify conventional antitrust standards for cooperatives, and to remove the threat of prosecution by the Attorney General. Far from being confined to the mere reporting function of the Federal Trade Commission in the Webb-Pomerene Act, the Secretary of Agriculture was vested with full power to serve formal complaints; to adjudicate whether a cooperative had monopolized or restrained trade and, if so, whether prices had been unduly enhanced; to issue orders against monopolization and restraint; and to have his orders enforced with full Sherman Act scope by the Attorney General in a district court.

It is of no significance to this case that the *Alkali* opinion analogized its ruling on Webb-Pomerene to the analysis of Capper-Volstead made in *United States*

v. *Borden Co.*, 308 U.S. 188 (1939). In context, that analogy was wholly proper. Chief Justice Stone stated that *Borden* rejected the contention that the Secretary of Agriculture's jurisdiction was exclusive "because [the cooperative] went beyond the immunity granted by the Capper-Volstead Act." 325 U.S. at 210. The accuracy of that statement cannot be doubted since the decision in *Borden* hinged, as the Government has conceded (J.S. No. 73, p. 9), on the cooperative's conspiracy with outsiders, conduct which the 67th Congress never intended to protect. But no study of the formulation of Capper-Volstead could possibly conclude that its application to nonconspiring cooperatives was patterned after or resembled in intent or design the provisions of the 65th Congress' Webb-Pomerene Act.[8]

Not all interpretations of federal law have rejected findings of implicit immunity. Only last Term this Court again faced the question, in a non-antitrust context, whether immunity from suit could be implied from a federal statute which did not in terms provide for it. In *Farmers Educational and Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959), a key issue was whether Section 315 of the Federal Communications Act of 1934 granted to stations which cannot censor broadcasts a federal immunity from liability for libel. A majority of the Court felt compelled by "traditional concepts of fairness" to find such immunity implicit in the statute despite a "contra-

[8] See also the reliance placed on legislative history to resolve questions of antitrust jurisdiction in *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959). In that case the legislative history demonstrated no intention to depart from traditional antitrust enforcement.

dictory legislative background" in which "some of the history supports [the] inference" that Congress did not intend to grant immunity. 360 U.S. at 531, 533. Four members of the Court dissented, declaring that an "implied grant of immunity" was impossible to find, even "between the lines." This view was based on the fact that "an express provision granting such immunity was excised from the bill" and repeated attempts later to replace it all failed. 360 U.S. at 536. No such ruling would be appropriate here. The legislative history of the Capper-Volstead Act, and in particular the rejection after great controversy of an express provision which would have denied immunity from antimonopoly law as such abundantly meets the standard set forth by the minority in *WDAY*.

For all of the foregoing reasons we believe that upon the showing that the only defendant was an authorized Capper-Volstead cooperative (R. 126) the amended complaint's charge of violation of Section 2 of the Sherman Act was properly dismissed, and the charge of violation of Section 7 of the Clayton Act should have been dismissed. The alleged violations of Sections 1 and 3 of the Sherman Act, on the other hand, should have been dismissed upon the failure of evidence or finding as to any conspiracy or combination with outsiders (R. 504). Such dismissals are required by the Capper-Volstead Act, which, as its history so clearly discloses, was intended to exempt non-conspiring farmer cooperatives from antitrust prosecution by the Department of Justice, except in accordance with the procedure set forth in Section 2 of that Act.

II. THE AUTHORIZED ANTICOMPETITIVE CHARACTER AND PURPOSE OF FARMER COOPERATIVE ACTIVITY PRECLUDES APPLICATION OF CONVENTIONAL ANTITRUST STANDARDS

Capper-Volstead formulated a charter for agricultural cooperation. In the years that followed, specialized agencies to work with cooperatives, special legislation to assist them in coping with competitive problems, and special procedures by which the government itself could regulate competition if cooperatives themselves could not control it, were all fruits of continuing congressional concern. Such statutes do more than contradict the very premises upon which the antitrust charges in this case are based. They provide in addition the authority upon which many of the Association's activities here specifically rested.

A. Special Agricultural Statutes

1. The Cooperative Marketing Act of 1926

In 1926 the Cooperative Marketing Act authorized the creation of a Division of Cooperative Marketing in the Department of Agriculture. 44 Stat. 802; 7 U.S.C.A. § 452, note. The Division was directed to render a wide variety of services to producer associations "engaged in the cooperative marketing of agricultural products, including processing, warehousing, manufacturing, storage, the cooperative purchasing of farm supplies, credit, financing, insurance, and other cooperative activities." 7 U.S.C. § 453(a). It was authorized to conduct economic studies in all phases of cooperation, to assist cooperatives in developing methods of business and market analysis, to aid individual producer groups by analyzing facts surrounding the production, pricing and marketing of their products, and in general to promote the knowledge of cooperative

principles and practices. 7 U.S.C. § 453(b). All such information was made freely exchangeable by farmers, cooperatives and their federations. 7 U.S.C. § 455. Compare *American Column & Lumber Co.* v. *United States,* 257 U.S. 377 (1921).

After having been transferred from the Department of Agriculture to the Federal Farm Board for several years, the Division was returned to the Department in 1939, where it remains today under the direction and supervision of the Secretary of Agriculture as the Farmer Cooperative Service. 7 U.S.C.A. § 452, note. It is this Service which, as we shall show below, has effectively stimulated the growth in size and power of farmer cooperatives.

2. The Agricultural Marketing Act of 1929

Three years later, in 1929, the Agricultural Marketing Act declared, in Section 1, that it was the policy of Congress to promote "the effective merchandizing of agricultural commodities" and "to protect, control, and stabilize" the currents of commerce in the marketing of such commodities. 46 Stat. 11, 12 U.S.C. § 1141(a). In the realm of antitrust such language marks an enemy. No concepts could be more at war with competition than those of protecting, controlling or stabilizing trade and commerce. In the world of industry, notions such as these are thought of as stifling initiative, retarding progress and preventing the benefits of quality and price from reaching the consumer.

Section 1 further prescribed that the policy of Congress towards agriculture should be carried out by (1) "minimizing speculation," (2) "preventing inefficient

and wasteful methods of distribution," (3) encouraging "greater unity of effort in marketing" by producer organizations, (4) "promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations," and

> (5) "aiding in preventing and controlling surpluses in any agricultural commodity, through orderly production and distribution, so as to maintain advantgeous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity." 12 U.S.C. § 1141(a).

For industry, in contrast, it is competition rather than stability that eliminates "wasteful methods of distribution" and prevents surpluses. And lower prices are one of the goals toward which industrial competition strives, rather than one of the evils which it seeks to eliminate.

Section 7 of the Marketing Act proceeded to authorize the Federal Farm Board, now the Farm Credit Administration, to make loans to eligible farmer cooperatives for the "construction or acquisition by purchase or lease . . . of physical facilities," where such loans would be in "furtherance of the policy declared in Section 1" and where the purchase price was found to be "reasonable." 12 U.S.C. § 1141e. The lending authority of the Agricultural Marketing Act was vested by the Farm Credit Act of 1933 (48 Stat. 257) in regional banks for cooperatives, 12 U.S.C. § 1134c, established for that purpose by the Governor of the Farm Credit Administration, 12 U.S.C. § 1134, and enjoying the legal status of "instrumentalities of the United States." 12 U.S.C. § 1138c.

Thus in the 1929 Marketing Act, Congress not only declared a comprehensive anticompetitive policy for the marketing of agricultural products but authorized the use of federal funds to promote it.

3. The Agricultural Marketing Agreement Act of 1937

On June 3, 1937 Congress passed the Agricultural Marketing Agreement Act upon a finding that the disruption of the orderly exchange of agricultural commodities "impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure." 50 Stat. 246, 7 U.S.C. § 601. That Act, as amended, spells out further techniques for controlling the marketing of farm commodities.

Section 608(b) of Title 7 provides that the Secretary of Agriculture shall have the power to enter into marketing agreements with processors, producers, cooperatives and others engaged in the handling of agricultural commodities. In cases where a marketing agreement cannot be reached, the Secretary is authorized, upon the vote of a sufficient number of producers, to issue orders regulating the handling of agricultural commodities. 7 U.S.C. § 608(c)(1). Relevant to this case, such orders may classify milk according to use and fix "minimum prices for each such use classification which all handlers shall pay . . . for milk purchased from producers or associations of producers." 7 U.S.C. § 608(c)(5)(A). Capper-Volstead cooperatives are authorized to adopt a blend pricing system for the purpose of distributing the proceeds to members, but are forbidden to sell milk to any handler at prices less than the fixed minimum. 7 U.S.C. § 608 (c)(5)(F). Marketing orders may also prohibit

"unfair methods of competition and unfair trade practices" in the handling of a commodity. 7 U.S.C. § 608(c)(7)(A). The Act also requires the Secretary to (7 U.S.C. § 610(b)(1))

> accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

The Agricultural Marketing Agreement Act thus afforded cooperatives a federal ally in raising the returns to its producers if self-help methods should fail.

B. Federal Administrative Policies in Agricultural Cooperation

Under the stimulus of the foregoing statutes, the federal government has consistently encouraged the spread of cooperative ventures in agriculture. Through the assistance and promotional activities of the Farmer Cooperative Service, the lending authority of the Agricultural Marketing Act and the issuance of Federal Marketing Orders, cooperatives have been urged to expand, both horizontally and vertically, and to take other steps designed to overcome the ravaging effects of competition. The helping hand of federal authority has been extended in virtually every phase of agriculture; we emphasize the dairy field only because of its particular relevance to this case.

1. Size and Power

Federal farm agencies have consistently emphasized the need for cooperatives to grow in size and market power. As early as 1930, the Federal Farm Board,

reporting on its operations under the Agricultural Marketing Act, stated:[9]

> The new law, passed in June, 1929, has intensified the farmer's interest in cooperative marketing. Farmers are gradually controlling a greater volume of their products as they move through marketing channels to the processor or ultimate consumer. By collective action, growers are extending their marketing system, strengthening their position in bargaining on central markets, developing a credit system that will make them more independent, and improving their chances of adjusting production to prevent troublesome surpluses.

The Board characterized the Act as "a law designed to give farmers governmental aid in order that they may help themselves," and declared its policy with regard to large farmer organizations:[10]

> In general, central marketing is being developed under a plan whereby each cooperatively handled commodity of the country will be under the control of a single farmer-owned and farmer-controlled organization, thus giving growers a chance to have something to say about the selling price of their products . . .
>
> It is the policy of the Federal Farm Board to approve and to support only one national commodity-selling plan and organization. This is done in order to bring a large volume of a commodity under the control of one management, to avoid dupli-

[9] *Farmers Build Their Marketing Machinery: The Agricultural Marketing Act Helps in Developing Cooperative Program Open to All Growers* (Federal Farm Board Bulletin No. 3, December 1930), at 1-2.

[10] Id. at 2.

> cation of cooperative marketing facilities, and to eliminate the wasteful competition that naturally develops where there is more than one central agency.

The Board stressed that cooperatives handling the same commodity should consolidate, expressing the ultimate objective as follows:[11]

> Eventually, this is expected to do away with competition among cooperatives handling the same commodity. With the majority of producers inside the master commodity circle, where the sales are controlled by a single national marketing organization, farmers may be able to put agriculture on a basis of economic equality with other industries.

As illustrative of the Agricultural Marketing Act's impact on milk, the Board noted that producers in New England were currently "working on a plan for formation of an overhead milk bargaining association for all the New England states except Connecticut."[12] These early policies of the Federal Farm Board are continuing today under its successor, the Farm Credit Administration.[13]

The objectives of size and power also keynote the advice which the Farmer Cooperative Service, in carrying out its statutory responsibilities, has given to

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[11] Id. at 4.

[12] Id. at 44.

[13] See statement of R. B. Tootell, Governor of the Farm Credit Administration, made before the American Institute of Cooperation (Farm Credit Administration Release, August 25, 1958).

cooperatives through the years. In the words of its Administrator, Joseph G. Knapp:[14]

> Cooperatives *must* become larger and stronger. Small cooperatives, no matter how efficient, cannot meet the needs of our present large scale agricultural and industrial economy.

The Farmer Cooperative Service has urged dairy cooperatives in particular, to merge into "combinations of larger operating units." "Willingness to clearly and forcefully discuss mergers," the Chief of the Dairy Branch has stated, can lead to a "stronger organizational base" and "make possible much more effective bargaining and merchandising programs."[15] The effectiveness of governmental encouragement of dairy cooperative growth is reflected in statistics recently reported by the Dairy Branch of the Farmer Cooperative Service. These figures show that in 1957 dairy cooperatives marketed almost 60 percent of all whole milk sold by farmers to plants and dealers in the United States.[16]

2. Vertical Integration

Federal farm agencies have encouraged and promoted vertical as well as horizontal growth by co-

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[14] Knapp, *Co-op Musts to Set the Pace*, in News for Farmer Cooperatives, p. 5 (August 1958). This magazine is published monthly by the Farmer Cooperative Service, U.S. Department of Agriculture.

[15] Krause, *Dairy Co-ops Moving to Meet the Test*, in News for Farmer Cooperatives, pp. 7, 27 (January 1959). See also *Cooperatives and Agricultural Integration*, a compilation of integration articles from the News for Farmer Cooperatives, contained in Reprint 150, Farmer Cooperative Service (February 1958).

[16] Gessner and Krause, *Dairy Cooperatives Report on Integrated Activity*, in News for Farmer Cooperatives, p. 12 (February 1959).

operatives. With regard to integration, the Federal Farm Board in 1930 reported:[17]

> In aiding dairy cooperatives in building larger marketing units, the Federal Farm Board realized that local cooperative creameries and cheese factories are absolutely fundamental in the development of a more effective merchandising program. Therefore, wherever it is possible, definite assistance is being extended to the local cooperative organizations.

More recently the Administrator of the Farmer Cooperative Service warned that "if the farmers do not effectively integrate they will be effectively integrated."[18] The policy of the Farmer Cooperative Service is typified by its recent statement to Congress in support of its request for funds:[19]

> Farmer Cooperative Service is receiving increased requests to help cooperatives on their problems in developing better integrated and stronger organizations to give farmers increased bargaining power, greater operating efficiency, and other large-scale organizational advantages.

On August 25, 1958, the Secretary of Agriculture in a speech to the annual meeting of the American Insti-

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[17] Federal Farm Board Bulletin No. 3, *supra* note 9, at 46. See also the statement of the General Counsel of the Federal Farm Board before the American Institute of Cooperation, *Financial Structure of Cooperatives*, p. 3 (Federal Farm Board Circular No. 4, June 1931).

[18] Knapp, *The Test of Farmer Cooperatives*, in News for Farmer Cooperatives, p. 3 (January 1959).

[19] Hearings Before Agriculture Subcommittee of the Commmittee on Appropriations, House of Representatives, 86th Congress, First Session, pp. 1011, 1013 (March 3, 1959).

tute of Cooperation[20] implored cooperatives to develop effective bargaining power through vertical integration. While many cooperatives were "making notable progress in integration and consolidation," the Secretary stated, "advances have been hesitant rather than bold, halting rather than aggressive." He challenged cooperatives "to get off the defense and to get out in front," stating that[21]

> you have a responsibility to do this. And this responsibility is shared by the State Agricultural Extension Services, the Farmer Cooperative Service, the Rural Electrification Administration, and by the Farm Credit Administration.

"Build your cooperatives bigger," urged the Secretary.

The promotional efforts of the Federal Farm Board, the Farmer Cooperative Service and other farm agencies have had particular impact on vertical integration by milk cooperatives. A bulletin released by the Department of Agriculture in July 1958 reported:[22]

> There is a clear-cut pattern of vertical integration among cooperatives that bottle and distribute fluid milk. These firms provide integration from the pickup of milk at the farm to the display case of the supermarket or to the home doorsteps. An estimated 243 cooperatives bottled and distributed some 3.5 billion pounds of milk in 1956.

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[20] USDA 2364-58, U.S. Department of Agriculture, Office of the Secretary.

[21] Id. at 9.

[22] *Contract Farming and Vertical Integration in Agriculture* (Information Bulletin No. 198, July 1958), at 16.

Statistics reported by the Farmer Cooperative Service disclose that cooperatives now manufacture 58 per cent of all creamery butter, 23 per cent of the cheddar cheese, 74 per cent of the nonfat dry milk, and 70 per cent of the dry buttermilk produced in the United States. Regional breakdowns of these figures show that in many areas cooperatives account for up to 100% of such production and manufacturing.[23]

A major consideration in counseling milk cooperatives to integrate vertically has been the urgent need to meet the surplus milk problem. As the Farmer Cooperative Service has observed:[24]

> One of the bargaining association's most troublesome problems is to dispose successfully of milk it cannot sell for consumption in fluid form. Distributors use only limited quantities of such milk in their regular businesses . . . A surplus that becomes a large proportion of the total milk in a market requires special handling.

In such circumstances, much of the milk may have to be made into manufactured dairy products. This can be accomplished either by selling the surplus milk to specialized manufacturing plants or "in the absence of a better alternative they may establish such plants themselves." There is yet a third alternative:[25]

> In some instances bargaining associations have had to take control of distributing businesses to safeguard producers' interests.

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[23] Gessner and Krause, *Dairy Cooperatives Report on Integrated Activity*, in News for Farmer Cooperatives, p. 12 (February 1959).

[24] Hirsch, *Dairy Cooperatives Help Find Markets*, in Farmer Cooperatives in the United States, pp. 45, 51 (FCS Bulletin 1, December 1955).

[25] Ibid.

3. Pricing Policies

Advice antithetical to principles of competition has also been given in the area of pricing. Thus, the Farmer Cooperative Service has indicated that quantity discounts may be used to lower a cooperative's costs by encouraging exclusive dealing:[26]

> Quantity discounts to wholesale and retail customers should be developed in a sound manner, however. For example, if the revised prices charged to small-volume retail customers are exactly in line with costs during a past period, they may be prohibitively high . . . The optimum pricing plan probably lies somewhere between uniform prices per unit to all customers, regardless of quantity purchased, and a quantity discount plan based entirely on cost as related to quantity delivered.

The special appeal of discount plans not justified entirely by cost savings was said to "encourage the practice of buying from a single distributor [cooperative]."[27]

The Farmer Cooperative Service has counseled milk cooperatives to use a classified use system in order to secure price stability. In a bulletin entitled *Pricing Milk According To Use*, the Service said:[28]

> This study was designed to help dairy cooperatives and others solve problems associated with

[26] Hirsch, *Selling Milk. Ideas for Cooperative Managements*, p. 8 (General Report 20, Farmer Cooperative Service, October 1955).

[27] Ibid.

[28] FCS Bulletin 6, p. iii (Farmer Cooperative Service, June 1955).

> pricing milk according to its use . . . The clearest and most important benefit of use classification is a stable market for milk . . .

Prior to classified use pricing prices dropped precipitously during the heavy surplus season. The "unstable markets and prices" which resulted provided the background for the rise of many producer cooperatives. The Bulletin advised that by combining marketing plans with use classification pricing[29]

> producers can more readily obtain stable markets, equitable distribution of returns, adequate prices, and a basis for orderly bargaining . . . Today class pricing exists in most sizable milk markets and all the Federal order markets.

The Bulletin recommended that cooperatives consider adopting classified use plans when any of four adverse competitive situations exists:[30]

> (1) Producers bargain with dealers, but dealers use reserve milk as a weapon to hold down the price;
>
> (2) Wide price changes occur with little apparent change in other market conditions;
>
> (3) Price wars—caused by the efforts of some handlers to avoid losses on reserve milk bought at a flat price—develop in the market with producers bearing most of the cost; and
>
> (4) Handlers are refusing to receive milk from some producers who have been shipping milk regularly to them.

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[29] Ibid.

[30] Id. at iv.

The injury to cooperatives from disruptive practices was dramatically summarized:[31]

> The actions of nonmember producers and noncontracting dealers sometimes undercut the price structure. Dealers who buy none or only part of their milk from a cooperative may attempt to buy just enough milk for fluid requirements and pay the blend price or slightly above. These dealers can maintain this higher use by careful choice of producers, by raiding cooperative members when milk is needed, and by cutting off unnecessary producers when milk is not needed.
>
> These actions by dealers who do not pay on a class pricing basis may place at a disadvantage members of the cooperatives that do use class pricing. Producers whose milk is sold on a class basis must carry more than their share of the necessary reserve of milk for the market. Their blend price is reduced and the unstable conditions which led to the adoption of class pricing may be repeated.

Counterattack by cooperatives is counseled:[32]

> Cooperatives can use contracts, membership relations programs, and activities to strengthen producer-dealer ties to prevent nonmember producers and noncontracting dealers from breaking down the pricing plan. Activities to help dealers may include quality programs and milk sales promotion. It may sometimes be necessary to obtain a Federal or State order to maintain use classification and an orderly market.

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[31] Id. at 48.

[32] Id. at iv.

And, as the farm agencies have repeatedly stressed, it may be necessary in the face of such disruptive practices for agricultural associations "to take control of distributing businesses to safeguard producers' interest."[33]

C. Monopolization and Farmer Cooperatives

The essence of the charge in this case is monopolization. The Department of Justice has asserted that a farmer cooperative has monopolized and attempted to monopolize the production, distribution and sale of milk, and has acquired distribution facilities with the intent and effect of lessening competition or tending to create a monopoly. The Department of Justice carefully refrains from contending that a cooperative is subject to the Sherman Act if it simply "obtains a monopoly" (J.S. No. 73, p. 9). Instead it argues that the monopoly is forbidden only if it is achieved by "anticompetitive" means or if its power is utilized to "foreclose" competition (J.S. No. 73, p. 11). But no recourse to the shibboleths of a competitive system can hide the fact that Capper-Volstead did not merely validate existing agricultural monopolies; rather, it authorized farmer cooperatives, whether large or small, actively to acquire monopolies in the marketing of agricultural products. Congress thus permitted farmers to do the very thing which controlling antitrust decisions of this Court forbid in other sectors of the economy. To hold those decisions applicable here would effectively repeal the Capper-Volstead Act, reverse the policy of later agricultural statutes and destroy the farmer cooperative movement.

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[33]See Hirsch, note 24 *supra*.

1. The Attributes of Monopoly Power

In *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 57 (1911), this Court traced the meaning of "to monopolize" back to the condemnation in England of those contracts or acts "which were thought to unduly diminish competition and hence to enhance prices." These evils of monopoly have only recently been recalled as the curse against which Section 2 of the Sherman Act was directed. *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 389 (1956). But the actual achievement of these attributes of monopoly is not all that Section 2 of the Sherman Act prohibits. The possession of power, purposefully acquired, is now considered sufficient to violate the Act.

The doctrine of monopoly power is perhaps no more fully articulated in recent times than in this Court's review of controlling cases in *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946). "The material consideration in determining whether a monopoly exists," it declared (328 U.S. at 811),

> is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so.

Trade and commerce are thus "monopolized" within the meaning of the Sherman Act (ibid.)

> when, as a result of efforts to that end such power is obtained that a few persons acting together can control the prices of a commodity moving in interstate commerce. It is not necessary that the power thus obtained should be exercised. Its existence is sufficient.

The argument that a combination or a corporation could constitute a monopoly, yet not monopolize in violation of law was effectively torpedoed by *American Tobacco's* endorsement of the Second Circuit's opinion in *Aluminum Company of America* v. *United States,* 148 F. 2d 416 (1945). According to the analysis adopted from *Alcoa,* (1) the mere existence of a monopoly would not constitute exercise of monopoly power "only so long as the monopoly remained wholly inert," (2) a combination of all existing producers in an industry would certainly monopolize the market whether or not they engaged in unlawful trade practices, (3) a combination of only 90 per cent of the producers certainly "would have been to monopolize the . . . market," and (4) the exclusion of competitors at which the Sherman Act aims does not require actual ousting of existing competitors; effective exclusion resulting from the monopoly's size and power previously acquired is sufficient. *American Tobacco Co.* v. *United States,* 328 U.S. at 813-14.

2. The Monopoly Power of a Farmer Cooperative

The classic doctrines endorsed and announced in *American Tobacco* would, if applicable, pronounce a death sentence for the farmer cooperative movement of the past forty years. In response to their statutory authorizations, and to the eloquent and persistent urging of federal agencies, cooperatives have acquired, maintained and utilized market size and power, indistinguishable from that of a monopoly. Competition has been eliminated both horizontally and vertically in the drive to increase efficiency, reduce costs of distribution, stabilize prices and enhance returns to the producer.

Under the rule of *American Tobacco,* the unexercised power to raise prices and exclude competitors at will by itself creates an offense, criminal and civil, against Section 2 of the Sherman Act. Under the Capper-Volstead Act, authority is given for competitors to combine for the purpose and with the power to raise prices; such combinations have the inherent capacity to exclude competitors. In the light of such conflict in statutory objectives, can the Department of Justice be permitted to apply the Sherman Act to a Capper-Volstead cooperative by charging that its lawful monopoly monopolized unlawfully?

Under the Capper-Volstead Act, 100 per cent of the producers serving a market may decide to "pool crops, to fix prices, establish common processing and marketing agencies" (J.S. No. 73, p. 11). Accordingly, they may combine into one cooperative association. By channeling all their produce into facilities built and owned by the cooperative, they will automatically foreclose every middleman in the market. There is thus vested in the control of the one organization the power to raise prices and exclude competition. The market is monopolized. The cooperative's growth and acquisition of monopoly power has taken place strictly within the authority of the Capper-Volstead Act. Yet under the standards of *American Tobacco,* Section 2 of the Sherman Act would be violated.

Can the Department of Justice proceed? An affirmative answer would mark a hasty return to pre-Clayton Act days when combinations of farmers were freely prosecuted or threatened because of their inherently anticompetitive character. Or, does a monopoly achieved by means of Capper-Volstead be-

come indictable only if the cooperative commits a "predatory" act or acquires an outlet serving competing producers? An affirmative reply to this question would create a distinction between good and bad monopolization. There is no such line. Congress "did not condone 'good' trusts' and condemn 'bad' ones; it forbad all." *United States* v. *Aluminum Company of America,* 148 F. 2d 416, 427 (2d Cir. 1945). And the use of antitrust cliches such as "predatory," "exclusionary," "anticompetitive" or "foreclosure" make no sense in the context of statutes designed to promote powerful combinations of producers, to raise and stabilize prices and to eliminate middlemen. Where Congress has authorized farmers to acquire monopoly power, the applicability of antitrust statutes cannot depend on whether the means by which the power is achieved or maintained are "properly" or "improperly" anticompetitive. *Alcoa* held that even the increase of productive facilities to meet expected increase in demand was "exclusionary." 148 F. 2d at 431. Simple refusal by an integrated monopolist to deal with an independent supplier may well foreclose the market and drive the supplier out of business. The impossibility of applying conventional antitrust standards and the irreconcilable clash between antitrust and agricultural policies are illustrated by the complaint in this case.

3. The Complaint in This Case

When the defendant here became a cooperative in October 1923 (R. 566), it controlled through its members at least 85% of the milk supply of the Washington market (R. 568). Over virtually all of the period since that beginning its market share has varied be-

tween 85 and 90% (R. 569). By legal and economic definition, the Association is and always has been a monopoly. Recognizing this fact, the Department of Justice urges this Court to hold that "Aside from the fact that the defendant controlled 86%" of the market (J. S. No. 73, p. 9), the cooperative's alleged monopolization and attempts to monopolize by "anticompetitive" means are unlawful. An analysis of those means is revealing.

a. *Prices*

The amended complaint (R. 12-25) charges that the Association "fixed and maintained arbitrary and noncompetitive prices and terms for the sale of milk" (¶ 22a, R. 17). It also alleges that the Association "charged dealers higher prices" for milk to be resold within the Washington area and "lower prices for milk purchased for resale outside" (¶ 22j, R. 18). The alleged effect of such pricing practices is a "rigid and artificial pricing structure in the sale of milk" in the area, "denying consumers the opportunity to buy fluid milk at prices resulting from free and open competition in the production and sale of milk" (¶ 30h, R. 22).

These allegations, plainly proper in the context of industrial restraints or monopoly, disclose a fundamental ignorance of the very purpose for which Congress created cooperatives. "Free and open competition in the production and sale of milk" is precisely what Capper-Volstead was designed to discourage. And when a combination of producers reaches monopoly size, any price charged is by definition a "noncompetitive" price "fixed" by the force of monopoly power. *American Tobacco Co.* v. *United States*, 328

U.S. at 813. The fact that a cooperative may have charged higher prices for milk to be resold inside its market, and lower prices for outside, would simply mean that some of the milk produced by the cooperative's members became surplus to the monopolized market's requirements and had to be sold in competition elsewhere. The failure of the Department of Justice to recognize the distinction between cooperative-controlled and competitive markets explains in part the amended complaint's allegations of eight instances of so-called "predatory pricing" since 1930 (¶ 22g, R. 18). At least four of these related to situations in which the Association sold its members' milk in competitive markets at prices lower than the Class I price in Washington (¶ 22g, R. 18; g. 4, g. 6, g. 7, g. 8, R. 44).

Significantly, the amended complaint nowhere alleges that the "arbitrary" prices "fixed" by the Association were prices that had been unduly enhanced. Evidence of that would of course have warranted a proceeding by the Secretary of Agriculture in accordance with Section 2 of the Capper-Volstead Act. To the contrary, however, evidence adduced through an official of the Farmer Cooperative Service, Department of Agriculture, affirmatively showed that Washington area prices were "practically the same as other markets in the area" (R. 414). Such evidence was wholly consistent with the finding of the Baltimore Bank for Cooperatives that it had been the Association's policy "to keep price objectives in line with economic conditions, with no attempt to force prices up when not justified by supply and demand conditions" (R. 570).

b. *Competition Among Producers*

A number of sub-paragraphs of the amended complaint charged that the Association eliminated or attempted to eliminate competition with other producers (e.g. ¶ 22b, e, f, i, R. 17-18). The alleged effect of such activities was to substantially lessen or impair competition in the production and sale of milk (e.g. ¶ 30 e, g, i, R. 22).

Such charges again disregard the fact that Capper-Volstead authorized the elimination of competition among producers, and that this result had been substantially achieved long prior to the period involved in this case when competing producers representing 85% of the market voluntarily joined the Association at its inception (R. 568). Moreover, many of the Association's alleged attempts to reduce producer competition relate, as particularized by the prosecution below, to urging governmental authorities to maintain high standards of inspection and quality for milk production by dairy farmers (b. 3, R. 38; e. 10, R. 42; i. 1 and i. 2, R. 55), "as a condition for the sale of their fluid milk in the metropolitan area." See *United States* v. *Rock Royal Co-op*, 307 U.S. 533, 550 (1939). A large number of particulars allege full or minimum supply contracts between the Association and its dealers (R, 36-45). Such agreements, if used, might well be "necessary contracts" within the meaning of Section 1 of Capper-Volstead because of the acknowledged need of the farmer to have an assured outlet or market for his highly perishable product. The Farmer Cooperative Service has counselled the use of quantity discounts toward this end. See page 88, *supra*. Other particulars refer to the Association's

alleged motive in urging amendment of a milk marketing order (i. 5, R. 55), cf. *United States* v. *Rock Royal Co-op.*, 307 U.S. at 559-60, or to agreements on price between the Association and another Capper-Volstead dairy cooperative (c. 1, R. 40). Yet common marketing agencies for cooperatives are expressly authorized by Section 1 of Capper-Volstead, while the Cooperative Marketing Act permits free exchange of price information. 7 U.S.C. §§ 291, 455; *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151 (D. D.C. 1957).

c. Relations With Dealers

Several allegations in the monopolization count charged the Association with "anticompetitive" conduct in relation to dealers or with acquiring or attempting to acquire dealer and manufacturing outlets (¶ 22 d, e, f, h, k, R. 17-18). The effects of such activities were alleged to include increasing the Association's control of the market, eliminating dealers or reducing competition among them, and foreclosing independent producers (¶ 30, R. 21-22). In support of such charges the prosecution cited, in addition to many of the practices previously discussed, specific acquisitions by the Association as well as conduct relating to federal marketing orders.

In particular, it specified the Association's acquisition of Holbrook Farms Dairy in 1941 (d. 1, R. 40), Olney Acres Manufacturing Plant, Laurel, Maryland, in 1955 (d. 4, R. 41); and an attempt to acquire Harvey Dairy, Inc. in 1954 (d. 3, R. 40). But the principal acquisition complained of in the monopolization case was that of Embassy Dairy, Inc. in 1954 (b. 14, R. 40;

d. 2, R. 40; k. 4, R. 57). With the exception of Embassy Dairy, the facts relating to these charges are not in the record because the district court dismissed the Section 2 of the Sherman Act complaint (R. 74-75). The Embassy trial, however, affords an opportunity to consider in detail the nature of a cooperative's "monopolization" by way of acquisition.

In addition, threats by the Association to apply for a federal marketing order were cited (d. 2, R. 40; e. 4, R. 41; k. 5, R. 57). The right of an association of producers to seek the issuance of such orders where competition has disrupted the market is expressly conferred by the Agricultural Marketing Agreement Act of 1937, as amended, specifically upheld by this Court in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939).

4. The Trial of the Embassy Dairy Acquisition

The clash of agricultural and antitrust policies dramatically unfolded in the trials under Section 7 of the Clayton Act and Sections 1 and 3 of the Sherman Act of the Association's acquisition of the assets of Embassy Dairy, Inc. The fact that the Embassy acquisition was prominent among the alleged means of monopolization charged under Section 2 of the Sherman Act and was central to the allegations under Section 7 (¶ 29, R. 21) and Sections 1 and 3 (¶¶ 24-28, R. 18-21) makes it a significant test of the applicability of traditional antitrust standards to a farmer cooperative.

Prior to 1954, there were 12 milk dealers ("dairies," "distributors," "handlers") in the Washington market, all independent of ownership or control by the Association (Gov. Exh. 94, R. 636). Embassy Dairy was the largest of several whose milk was supplied

almost exclusively by non-members of the Association. The Association, prompted by an increasing surplus problem, solicited Embassy as a Class I customer (R. 382). Embassy refused to buy at prevailing Association prices but counteroffered to sell its whole business (R. 384). The proposition was attractive, particularly since the instability of prices, due in large part to Embassy's use of cheap milk from outside the market, was of grave concern to the Association. Since it had but two alternatives in the situation, i.e. "Acquire ownership of the business, or ask for a Federal Order in the Washington market" (Gov. Exh. 25, R. 557), the Association elected to buy Embassy.

The federal statutory and administrative impetus for such a decision by the Association was overwhelming. The basic charter for the move was Section 1 of the Capper-Volstead Act which authorized farmers and dairymen to "act together in . . . collectively processing, preparing for market, handling, and marketing" their products. The right to "make the necessary contracts and agreements to effect such purposes" plainly drew no distinction between building new facilities or buying existing ones.

In addition to this authorization the Association needed money. The Agricultural Marketing Act and the lending agencies created to execute its mandate filled that need. The Act directed the Farm Credit Administration to lend funds to cooperatives for the "construction or acquisition" of processing and marketing facilities. See page 79, *supra*. Accordingly, the Association applied to the Baltimore Bank for Cooperatives for a loan of several million dollars with which to buy Embassy (R. 558). The Bank, as well

as the Farmer Cooperative Service of the Department of Agriculture, thoroughly investigated the transaction. Both agencies found that alleviation of the surplus problem, elimination of price cutting and enhancement of returns to producers were factors "favorable" to the transaction (Gov. Exh. 27, R. 574, 576; Def. Exh. 19, R. 713, 715). Federal agricultural law made them so. In the administration of the Capper-Volstead and Agricultural Marketing Acts, the stabilization of marketing, the management of surpluses, and the prevention of "excessive fluctuations or depressions in prices" are controlling policies. 12 U.S.C. § 1141(a). The Bank's decision to finance the Embassy purchase specifically rested on findings, required by law, that the loan would further those policies (Gov. Exh. 114, R. 659). It so advised the Assistant Attorney General in charge of the Antitrust Division, Department of Justice, prior to the trial in this case (Gov. Exh. 114, R. 653, 657).

After the acquisition was consummated, it was again brought to the attention of the Department of Agriculture by the Association itself (Def. Exh. 64, R. 737). There, it was reviewed under Section 2 of the Capper-Volstead Act by the Solicitor of the Department, acting on behalf of the Secretary of Agriculture under a formal delegation of authority (Def. Exh. 66, R. 743). The Solicitor then advised the Attorney General that the Department's study of the Embassy acquisition disclosed no violation of the Capper-Volstead Act (Def. Exh. 65, R. 742-3, 413).

At trial, J. Kenneth Samuels, Director of the Marketing Division of the Farmer Cooperative Service (R. 407-433), testified that the Farmer Cooperative Service had, at the Association's request prior to trial,

made yet another study to determine the effect of the Embassy acquisition on the Washington market (R. 409). The study disclosed that retail prices in Washington "were practically the same as other markets in this area and in the vicinity" (R. 414), that producers would be able to sell a greater proportion of their milk "through the Association direct to the consumers" (R. 416), and indicated that the producers who had formerly supplied Embassy would, by joining the Association, "have to share in its disposition of the surplus of the milk" (R. 416). When asked how the acquisition accorded with the policy of the Farmer Cooperative Service, Mr. Samuels replied (R. 416):

> A. This purchase was in line with some of the things that we have been studying with regard to other cooperatives. We have been advising cooperatives and making studies of cooperatives on the feasibility and problems and methods of going into large marketing activities in milk, for instance, in the retail distribution and we feel that this movement on the part of producers here is similar to what is being undertaken by producers in many areas of the country.
>
> Q. Do you consider that this is for the benefit of the consumers?
>
> A. I think it would be a long-run benefit to the consumers and the producers.

But when government counsel, on cross-examination asked (R. 430):

> Q. Mr. Samuels, you also stated that the acquisition of Embassy Dairy by the Defendant Association was in line with what other cooperatives had been doing in other markets in this country. What other markets did you compare and did you study—

the district court on its own motion excluded the question. It took the view that "the mere fact that similar transactions might have been consummated in other markets would not affect the issues of this case" (R. 430).

The salient feature of the Embassy trial was that it was prosecuted by the Department of Justice and decided by the court as an ordinary antitrust case. No consideration was given to the agricultural policies involved, the lending of federal funds, the statutory findings made by the Bank for Cooperatives, the promotional activities of the Farmer Cooperative Service, the relevance of the surplus problem, or the absence of undue enhancement of prices. Where the agricultural agencies favored the purchase because it would tend to raise the blend price received by the farmer, the district court condemned the purchase because without it "prices might have fallen" (R. 493). Where the intent to promote market stability had led federal agricultural agencies to promote the acquisition, that same purpose, being anticompetitive, led the district court to condemn it.

5. The Inapplicability of Antitrust Standards

The findings and conclusions of the district court that the Association's acquisition of Embassy Dairy contravened antitrust standards has not, as such, been appealed to this Court. Rather, the focus of this appeal has been on the error in applying those standards at all. For if the antitrust laws apply, irreconcilable conflict with agricultural law and between coordinate branches of the federal government would be the only possible consequence.

The futility of applying antitrust standards in a farmer cooperative's market was pointed up four months after the district court entered final judgment. On May 26, 1959, the Department of Agriculture issued Federal Marketing Order No. 2 to regulate the handling of milk in the Washington area. 24 Fed. Reg. 4331. This order, applied for by the Association on behalf of its members and issued upon the affirmative vote of the market's producers, was recommended in a decision of the Assistant Secretary of Agriculture on May 1, 1959. 24 Fed. Reg. 3630. That decision concluded that a marketing order would "contribute substantially to the stabilization of the fluid milk market" and effectuate the policy of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, because (24 Fed. Reg. at 3631)

> the loss of Class I outlets, and the extensive price cutting which has prevailed over an extended period, have resulted in increasing market instability, which if continued, may lead to a complete breakdown of the marketing system. This situation constitutes a continuing and serious threat to a dependable supply of pure and wholesome milk for the Washington area.

The parallel in competitive effect between the issuance of the marketing order and the acquisition of Embassy Dairy is striking. Each action flowed from the desire to achieve market stability in the face of an increase in the Association's burden of surplus milk and of competition from out-of-area sources. Compare Gov. Exh. 27, R. 565, with 24 Fed. Reg. at 3631. Just as the acquisition of Embassy was favored by the Department of Agriculture because it would enable more producers to share the surplus burden carried by the Association (R. 416) so did the order recognize that

since the Association "carries the bulk of the necessary surplus of the market," a pooling procedure was warranted "which will provide for an equitable sharing by all producers of the lower returns realized from the handling of this necessary reserve supply of milk." 24 Fed. Reg. at 3643. Each action resulted from affirmative steps taken by the Association under specific statutory authority. And each action rested upon findings by agricultural agencies that competitive conditions warranted government assistance: a federal order in one instance and a federal loan in the other.

The validity of action by producer cooperatives to overcome competitive problems by seeking marketing orders regardless of their tendency to create a monopoly or "ulterior motives of corporate aggrandizement," has been firmly established by this Court's decision in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 559-560 (1939). So too, should the validity of vertical integration by a cooperative to overcome competitive problems be sanctioned by this Court under the Capper-Volstead Act and ensuing agricultural statutes. Any attempt to draw a line between lawful and unlawful anticompetitive acts of a cooperative association of farmers would only invite artful allegations in future antitrust indictments and complaints, thereby marking a return to the oppressive conditions that prompted the 67th Congress to enact Capper-Volstead as an exclusive remedy.

CONCLUSION

For all of the foregoing reasons we respectfully urge that the judgment of the district court in No. 62 be reversed and the judgment in No. 73 be affirmed.

Respectfully submitted,

WILLIAM J. HUGHES, JR.
821 15th Street, N. W.
Washington 5, D. C.

HERBERT A. BERGSON
DANIEL J. FREED
HOWARD ADLER, JR.
DANIEL H. MARGOLIS
918 16th Street, N. W.
Washington 6, D. C.

Attorneys for Maryland & Virginia Milk Producers Association

Of Counsel:

BERGSON & BORKLAND
918 16th Street, N. W.
Washington 6, D. C.

November 9, 1959.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 62

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *Appellant*

v.

UNITED STATES OF AMERICA

No. 73

UNITED STATES OF AMERICA, *Appellant*

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

On Appeal from the United States District Court for the District of Columbia

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APPENDIX

Statutes Involved

1. The Sherman Act: Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. §§ 2 and 3).

Section 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 3:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

2. The Clayton Act: Act of October 15, 1914, 38 Stat. 730, as amended.

Section 6 (15 U.S.C. § 17):

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall

be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 7, as amended, 64 Stat. 1125 (15 U.S.C. § 18):

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

* * *

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in

the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

3. The Capper-Volstead Act: Act of February 18, 1922, 42 Stat. 383 (7 U.S.C. §§ 291, 292).

Section 1:

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

Section 2:

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to plead-

ings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

SUMMARY OF LEGISLATIVE HISTORY OF THE CAPPER-VOLSTEAD ACT

1. Introduction

The Capper-Volstead Act is the Act of February 18, 1922, Public Law 146, 67th Congress, Second Session. It is found in 42 Stat. 388, c. 57, and is codified in Title 7, United States Code, Sections 291 and 292. It was originally introduced as H. R. 13931 by Congressman Volstead on May 4, 1920, in the 66th Congress (59 Cong. Rec. 6553). Although a similar bill, S. 4344, was introduced by Senator Capper in the Senate on May 7, 1920 (59 Cong. Rec. 6671), consideration in both chambers was directed to the House bill. It was amended and passed by the House in the Second Session (59 Cong. Rec. 8041) and by the Senate with amendment in the Third Session (60 Cong. Rec. 377). The House disagreed with the Senate amendments (60 Cong. Rec. 570) and the conferees appointed by the two houses were unable to agree prior to adjournment of the 66th Congress.

A slightly modified version of H.R. 13931 was introduced on April 11, 1921, as H.R. 2373 in the First Session of the 67th Congress by Congressman Volstead (61 Cong. Rec. 98). Senator Capper introduced a companion bill, S. 983, on April 19, 1921, but as in the 66th Congress consideration was directed to the House bill (61 Cong. Rec. 424). It passed the House with minor amendments (61 Cong. Rec. 1046). The Senate made some changes but this time rejected the two amendments which had previously caused the bill to fail (62 Cong. Rec. 2048 et seq.). The House agreed to the Senate version (62 Cong. Rec. 2455) and the bill was sent to the President.

2. House Consideration in the 66th Congress

The original text of H.R. 13931 provided in part as follows (59 Cong. Rec. 8023):

> That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, or fruit growers may act together in associations, corporate or otherwise, with or without capital stock in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of their members; and such producers may organize and operate such associations and make the necessary contracts and agreements to effect that purpose, any law to the contrary notwithstanding . . .

The balance of the bill was substantially the same as finally enacted. The bill was reported by the House Judiciary Committee in House Report 939, 66th Congress, Second Session (59 Cong. Rec. 6737). In pertinent part the report (reprinted at 59 Cong. Rec. 8033) stated:

> The object of this bill is to authorize the producers of agricultural products to form associations for the purpose of collectively preparing for market and marketing their products.
>
> Section 1 defines and limits the kind of associations to which the legislation applies. . . . The aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of its members might avail themselves of the provision of this bill . . .
>
> Section 2 makes applicable to these associations in a modified form the provisions of the Clayton Act. Briefly, it gives the Secretary of Agriculture power to prevent these associations from exploiting the public. In the event that any association should refuse to comply with the order of the Secretary, a suit may be brought in the appropriate district court to enforce his order. The farmers are not asking a chance to oppress the public, but insist that they should be given a fair opportunity to meet business conditions as they exist—a condition that is very unfair under the present

law. Wherever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for the purpose of collectively negotiating for a fair price, he is threatened with prosecution. Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members collectively do business as one person. The officers of the corporation act as agents of these members. This bill, if it becomes a law, will allow farmers to form like associations, the officers of which will act as agents for their members.

While this bill confers on farmers certain privileges, it cannot properly be said to be class legislation. Business corporations have under existing law all the powers and privileges sought to be conferred on farm organizations by this bill. Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it. Instead of granting to farmers a special privilege, it aims to take from the business corporations a special privilege by conferring a like privilege on farm organizations. It is no answer that farmers may acquire the status and secure the rights of a business corporation by deeding their farms to a corporation. That is neither practical nor desirable from any standpoint. Without doing that they cannot associate themselves together for the mutual profit of the members without being threatened with prosecution.

New York, Pennsylvania, Illinois, Wisconsin, Minnesota, and a number of other States have granted the right to form associations such as those contemplated in this bill. But these States can not confer any right upon their organizations to engage in interstate or foreign commerce. This bill is designed to grant that right. Associations of this kind are common in European countries and have been in operation for many years. Their effect has not been to raise prices to the consumer. In many instances the effect has been the reverse. They have tended to prevent much of the

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> gambling in foodstuffs and to eliminate many of the useless middlemen that stand between the producers, the retailers, and the consumers. It is one of the chief problems of these associations to reach the consumer with as little expense as possible. Farmers ought to be given a chance to do that. The high cost of living can not be solved by discouraging agriculture. It must be solved by fair treatment of those engaged in that pursuit. To maintain his self-respect and the dignity of his occupation the farmer must be given an opportunity to deal in selling his products on an equal footing with those who purchase it. He should be given an opportunity to help solve in a rational and fair way the problems involved in the high cost of living.

When H.R. 13931 came up in the House, Representative Morgan of Oklahoma, a member of the Judiciary Committee, was the first spokesman favoring it. Six years earlier, Morgan had been one of the dissenters from the Report on the Clayton Act because he believed that legislation inadequate for the purpose of exemption. Morgan traced the development of cooperatives, stated the exemption provided in Section 6 of the Clayton Act was unfortunately ambiguous, and declared it to be the intention of the proposed bill to make (59 Cong. Rec. 7851-2):

> a broader and more comprehensive declaration as to the kind and character of cooperative farm organizations which shall not be prohibited by the provisions of any of the antitrust laws.

The economic goals of the bill were summed up by Congressman Morgan as follows (59 Cong. Rec. 7852):

> 'Cooperative farmers' organizations will bring producers and consumers closer together. The excessive charges of unnecessary middlemen will be eliminated, and the cost of marketing, manufacturing, and distributing farm products will be greatly reduced. The producers and consumers will share equitably in the profits derived from cooperative business organizations among farmers. Prices will be stabilized, production will be more uniform and larger in the aggregate, the supply of food products will increase in proportion to

> the demand, speculations, gambling and profiteering in food products will be curtailed, controlled, and, in a large measure prevented, as a result the farmers will be more prosperous, the cost of living will be reduced, and the general public welfare will be benefited.

The purpose to eliminate the middleman through the formation of marketing cooperatives was echoed frequently in the course of debate on the Capper-Volstead Act. See e.g. Congressmen Swope of Kentucky (59 Cong. Rec. 8022); Mann of Illinois (59 Cong. Rec. 8027); Browne of Wisconsin (59 Cong. Rec. 8035).

Representative Walsh of Massachusetts, a member of the Judiciary Committee and one of the opponents of special antitrust treatment of agricultural cooperatives, complained that if the Secretary of Agriculture did not prosecute farmers, nobody could (59 Cong. Rec. 7857):

> Under the provisions of this bill we turn over to the Secretary of Agriculture, the guardian angel of the farmers of this country, the say so as to whether men shall be prosecuted in case they have, through the enhancement of price, lessened competition or restrained trade. That authority now in other industries is vested elsewhere.
>
> Furthermore, there is no provision in this bill for anybody to lodge a complaint or to require an investigation or prosecution.

Representative Cannon similarly complained that if the Secretary of Agriculture sympathized with a cooperative, there would be no remedy for its restraints of trade (59 Cong. Rec. 7858):

> On page 3 I find that on complaint the Secretary of Agriculture may regulate these people, or not regulate them, after investigation; and if they do not obey his mandate for the first time he can resort to the courts. But suppose he be in sympathy with the people that this bill would authorize to associate together, then I do not find that there is any appeal to be made in

that event to any court. He is supreme. Now, then, I want to say that I come from an agricultural State, a large agricultural district. I voted for the rule and I am in sympathy with apt legislation, but I do not want legislation that would shut out any American citizen from appealing for his real or supposed rights.

In a colloquy with Representative Moore of Virginia, Congressman Volstead revealed the source of the language of Section 2 of the Capper-Volstead Act (59 Cong. Rec. 8017):

> Mr. Moore of Virginia. The present law—the Clayton antitrust law—relieves associations of agriculture not having capital stock. Why should we disturb that law; why should not this bill be confined altogether to prospective agricultural associations that are to have capital stock?
>
> Mr. Volstead. Well, personally, I would not have any objection to that, although, as we are granting these associations much larger powers than they had under the Clayton Antitrust Act, it was thought that they ought to be put under some supervision, because there has been complaint against some of these associations, and it was for that reason section 2 was drawn. That section is modeled largely upon some of the provisions of the Clayton Antitrust Act.

The significance of this reference to "some of the provisions of the Clayton Antitrust Act" is discussed in the body of this brief, Part I.

Representative Sabath of Illinois bitterly opposed the bill because of the vicious practices which he believed it would authorize in the milk industry (59 Cong. Rec. 8018):

> You are authorizing the vicious system on the part of the dairymen to sell their milk only to those distributors that will pledge themselves to charge outrageous prices agreed upon months in advance. In fact, if this bill is enacted into law, it will enable the farmers and planters of this country to have the full power to exact any price the combination or organization chooses to charge.

Representative Volstead's observation that cooperatives could be prosecuted if they conspired with outsiders did not satisfy the bill's opponents (59 Cong. Rec. 8021):

> Mr. Volstead. Is it not a fact that these men may be prosecuted for combining or conspiring with any corporation to increase prices?
>
> Mr. Husted. Oh, they can organize just as big an association as they want, and the bill expressly provides that they may fix prices, any law to the contrary notwithstanding. And that includes not only the Sherman Antitrust Act, but the Clayton Act and every other act that in any way, shape, or manner attempts to control prices.

Representative Swope, a proponent of the bill, discussed the remedy provided by Section 2 against those cooperatives which might restrain trade (59 Cong. Rec. 8023):

> Section 2 of the bill to protect the consumer and outlines the remedy in case these organizations should restrain trade or lessen competition. My personal opinion is that the farmers will never abuse the privileges extended to them under this bill; nevertheless I think the committee has acted wisely by staying on the safe side and providing a remedy in case the privilege should be abused.

Representative Donovan of New York, a vigorous opponent of the bill, objected to removing farmers from the jurisdiction of the antitrust laws (59 Cong. Rec. 8027):

> This bill has some very pernicious and un-American features, the chief of which from a legal standpoint, in my opinion, is the one proposing to exempt from the present existing law relating to unfair competition and placing these proposed farmer organizations beyond its jurisdiction.
>
> * * *
>
> The bill proposes to take from the courts the right of initial proceeding, and vest a quasi judicial power in the Secretary of Agriculture, who alone is the one person to determine whether or not a violation in re-

straint of trade or unfair dealing is had, and the steps which ultimately may reach a court proceeding consume 60 days at least, and may, as the law is now drawn, consume even a greater length of time. During all of these preliminary steps which the Secretary of Agriculture alone may employ, the right to enjoin the offending organization of farmers is denied, and even the embargoing of the product of the complained of concern is denied.

* * *

Gentlemen, I believe the purpose of taking the farmer from without the jurisdiction of the antitrust and kindred laws is to avoid the scrutiny and evasion of the standards of cleanliness and the reduction of excessive profits, which the thriving communities and large cities in this country find it necessary to invoke under the law, which at present controls the situation.

Representative Igoe, a member of the Judiciary Committee and floor leader for the opposition, believed that the only legitimate purpose which the pending bill could achieve was removal of the Clayton Act's restriction against capital stock. This goal, he stated, could be attained simply by an amendment to remove the words "without capital stock" from Section 6. But the real purpose of the proponents, Igoe argued, was to permit farmers to form cooperatives which could go out and violate the antitrust laws. His principal example was the case of a milk producer cooperative which under the pending bill would be permitted to dictate to distributors that they sell the cooperative's milk exclusively, or not at all (59 Cong. Rec. 8031):

Here is the proposition: It is not to allow these farmers to cooperate and have capital stock. It is to allow them, after they are incorporated, to go out and do anything which any other corporation or individual can not do. Now, what is the effect of it? Take, for instance, the milk situation in the big cities. These people now have their cooperative associations without capital stock, but if they get this they can violate the laws against unfair trade, and they can go to the

people who deliver the milk and say, "We will sell you our milk, but on condition that you handle our milk exclusively. If you handle any other we will not sell to you." And they can control the prices the distributor may charge. They can say to the distributor, "We will allow you to sell our milk, but you must charge a certain price and give us a certain price." And so the big packers of this country under this law, if they desire to do it, could organize the ranchmen of the country and say to them, "Now, we will distribute your product and make an agreement as your agent to charge a certain price," and under this law they are absolutely free from every law on the statute books—the Sherman Act, the Clayton Act, the laws against unfair competition—and can go out in the country and take from the consumers as much as they want.

Representative Young of Texas opposed giving the Secretary of Agriculture the sole power to determine the destiny of farmers (59 Cong. Rec. 8034):

> Now what does this bill do? Take section 2, where you put your power in one man. If he is a good man, he might not abuse that power; but it is a man that you are reposing upon and intrusting the power to. The Secretary of Agriculture is given the power to determine the proposition as to whether farmers are combining to profiteer in wheat, cotton, or other agricultural products. That is a power that ought not to be put in a governmental agency. It is a safe rule not to vest such a power by statute; and yet you are vesting that power here in the Secretary of Agriculture, a power over the destiny of the farmers of this Nation.

Representative Green of Iowa was one of the few who believed that the bill gave farmers no privilege they did not already possess (59 Cong. Rec. 8034):

> Mr. Speaker, if I construed this bill in the same manner as many Members do, especially as those who oppose it construe it, I should not be inclined to favor it. I do not believe that the provisions of this bill confer upon the farmers any privileges which they did not

> have before. Certainly it does not confer upon any corporation organized by farmers any power which a corporation does not now have and which corporations are every day exercising. The bill gives them the right to organize for the purpose of marketing their products and authority to do any act which is necessary for that purpose. A careful examination of the bill convinces me that beyond that the bill gives them no privileges whatever.

Such statements, by raising the possibility that H.R. 13931 might not be giving farmers all that its sponsors hoped, led Representative Volstead to offer a precautionary amendment:

> At the end of section 2, add the following: *Provided*, That nothing contained in this section shall apply to the organizations or individual members thereof described in section 6 of the act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1915, known as the Clayton Act.

In support of the amendment he explained (59 Cong. Rec. 8036):

> The object of the amendment is to preserve to the farmers what rights they now have under the anti-trust act. There is some question whether section 2 might not take away some of the rights which they now have. There is no disposition on my part, and I do not think there was on the part of anyone, to deprive them of existing rights.

The amendment was adopted (59 Cong. Rec. 8037).

Representative Igoe objected to the clause in H.R. 13931 which permitted the making of contracts "any law to the contrary notwithstanding" (59 Cong. Rec. 8038). He also complained that the bill would allow cooperatives to coerce independent producers (59 Cong. Rec. 8039):

> They can go to the farmer, as they did in California, and say "You come in and join us or you can not

> do any business." And if this cooperative association goes to do business with the ultimate salesman or middleman, it can say to him, "You handle our stuff, but nobody else's," and they can put the independent farmer out of business.

Despite such criticism, the House on May 31, 1920, passed H.R. 13931 as amended by a vote of 234 to 58 (59 Cong. Rec. 8040).

3. Senate Consideration in the 66th Congress

H.R. 13931 was reported to the Senate by the Judiciary Committee in Senate Report 655 (66th Cong., 2d Sess.). The Report recommended several amendments to substitute the words "Federal Trade Commission" for "Secretary of Agriculture" in Section 2. In addition the Report proposed an amendment to Section 2 which would insert the following:

> Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, on account of unfair methods of competition in commerce.

The Report's only comment on the bill was that (page 2)

> It was felt by the Committee that it was safer to leave the supervision of associations provided for in the bill in the hands of the Federal Trade Commission than under the jurisdiction of the Secretary of Agriculture, especially as the Commission is already equipped with the requisite machinery to obtain information to carry out the provisions of Section 2 of the bill.

Senator King, a member of the Judiciary Committee who opposed the House bill, opened debate in the Senate by stating that the purpose of the Act was to permit farmers to combine to prepare their products for market, to handle

them, and to process or convert the raw materials into finished products. In addition, he said it provides (60 Cong. Rec. 312)

> that they shall not only be permitted to combine for the purpose of marketing their products, but for the purpose of holding them for an indefinite period in order to secure higher prices, even though such action might constitute a monopoly or restrain trade or be destructive of competition.

King said they could erect warehouses and store products to force higher prices; that they could form factories for the purpose of processing their products and might thus "take the form of monopolies, not only in production but in 'processing,' in handling, and in placing the products, raw or finished, upon the market" (60 Cong. Rec. 312).

He further stated that the bill (60 Cong. 313)

> legalizes combination by the classes mentioned in the bill, that such combinations so legalized may restrain trade and lessen competition; providing, however, that the restraint of trade or the lessening of competition shall not unduly enhance the price of the product, and that if notwithstanding there should be such restraint of trade and lessened or destroyed competition no criminal punishment would result.

Senator Borah, also a member of the Judiciary Committee, stated in capsule form the precise effect of the legislation (60 Cong. Rec. 315):

> [T]his measure . . . gives them a status of their own, fixes a different method of proceeding, and absolutely deprives the court, in the first instance, of examining into the question of whether or not they have violated the law . . . This matter . . . came up before the Senate years ago in the nature of an exemption in specific terms of farmers and laborers from the Sherman Antitrust Law. That has been followed up, and now it is proposed not to exempt them and leave no remedy at all, but to exempt them and provide another tribunal before which they can have their hearings. If

> this measure does not exempt them from the Sherman antitrust law, the farmers themselves are being fooled, because that is what they want.

Senator Overman inquired whether farmers were not already removed from the reach of the Sherman Act by Section 6 of the Clayton Act. Senator Borah replied that the Clayton Act exemption was too indefinite and that farmers "want definite and certain information that the Sherman antitrust law does not operate as to them" (60 Cong. Rec. 316).

Senator King asked (60 Cong. Rec. 373):

> Does the Senator think the bill would exempt from prosecution under the Sherman law any individuals of any association organized under the bill which created a monopoly or developed a monopoly in any of the products referred to in the bill?

Senator Walsh, Chairman of the Judiciary Committee and leader of the opposition to the House bill, replied that it was for that very reason that he had offered the Committee amendment providing:

> Nothing herein contained shall be deemed to authorize the creation of or attempt to create a monopoly, or to exempt any association organized hereunder from any proceeding instituted under the Act entitled "an act to supplement existing laws against the restraints and monopolies, and for other purposes" approved October 15, 1914 on account of unfair methods of competition in commerce.

He summarized the purpose of his amendment (60 Cong. Rec. 373):

> If any one of these organizations should resort to any monopolistic practices or attempt to drive any rival out of business or resort to corruption in the case of purely agreements or authority of that kind, they would all be subject to the operation of the Federal Trade Commission Act.

Just prior to passage of H.R. 1393 by the Senate, amendments were adopted (1) to substitute the words "Federal Trade Commission" in every place in which the term Secretary of Agriculture appeared, and (2) to add the "nothing herein" amendment of Senator Walsh as a separate paragraph (60 Cong. Rec. 376-7). Under the Senate version, therefore, the antitrust laws were to remain applicable in their entirety to cooperatives.

As previously indicated, the conferees for the Senate and House were unable to agree on their conflicting bills (60 Cong. Rec. 570). H.R. 13931 thus died with the passing of the 66th Congress.

4. House Consideration in the 67th Congress

H.R. 2373 was introduced by Congressman Volstead on April 11, 1921 (61 Cong. Rec. 98). It was reported in the First Session of the 67th Congress with an amendment on April 26, 1921, by the House Judiciary Committee in House Report 24 (61 Cong. Rec. 687). The Report repeated the analysis made in House Report 939 of the previous Congress. In addition, it stated:

> This bill directs the Secretary of Agriculture to supervise these associations. The reason for that is apparent when one considers the duties and the organization of that department. The Secretary has for many years aided farmers in forming such associations, and his department is thoroughly familiar with the needs and the difficulties under which they always have a struggle. There is in his department a Bureau of Markets that is constantly engaged in studying marketing conditions and prices of agricultural products both in this and foreign countries. As a consequence he is especially well equipped for the purpose of determining whether the prices charged by any of these associations are excessive. That is one of the duties that somebody must perform to safeguard the public.
>
> If it is safe not to place a limit upon the size of an ordinary corporation, there certainly is no reason to

> fear monopoly from farm associations. But in the event that any such association should monopolize or restrain trade so as to unduly enhance the price of any agricultural product ample provision is made in the bill to protect the public. The Secretary of Agriculture in a sundry fashion can grant relief, and he, with his expert knowledge always at hand, can act more expeditiously than could any other agency. In the event an association fails to abide by his judgment it can not only be hailed into court but a temporary injunction can at once be issued against it.
>
> In the event that associations authorized by this bill shall do anything forbidden by the Sherman Anti-trust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them.

Because of the extended debate on the bill in the preceding Congress, the debate on H.R. 2373 was brief (61 Cong. Rec. 1032-1046). As stated by Congressman Volstead (61 Cong. Rec. 1033):

> Mr. Speaker, a bill almost identical with it was introduced in the last Congress and passed by more than a two-third majority in this House, and went to the Senate, where it was somewhat amended. There was a disagreement between the House and the Senate, and the bill failed for that reason. I made some slight changes in reintroducing the bill, in order to meet some of the objections that were made in the Senate and otherwise to perfect the measure.

The principal changes from H.R. 13931 of the 66th Congress were deletion of both the "any law to the contrary notwithstanding" language from Section 1 and the Volstead amendment adopted in the previous Congress to exclude Clayton Act cooperatives. In the course of his explanation of the bill, Representative Volstead was careful to point out that (61 Cong. Rec. 1033):

If these organizations should combine with corporations not organized as provided in this bill to thus monopolize or restrain trade, they will become subject to the Sherman Antitrust Act just the same as any other combination or corporation.

Congressman Mills took issue with the House Report insofar as it appeared to limit the bill merely to granting permission for farmers to associate (61 Cong. Rec. 1039):

> But this bill has one other and to my judgment an ever greater defect. It purports, and in the report of the committee it is distinctly stated that it only purports to permit farmers' associations for the purpose of marketing their products and incidentally to economize in the marketing. If that is the purpose of the bill, I think we can all support it.
>
> • • •
>
> But this bill goes much farther than that. The report says that in so far as the terms of the act are concerned, aside from the mere act of forming an association, they do not apply. The report says that the bill does not eliminate those provisions of the Sherman anti-trust law. I beg to differ with that report.
>
> I should like to point out to you gentlemen that the bill permits the formation of these associations and permits the association and their members to make necessary agreements to effect such purposes. Now, what are the purposes referred to? Preparing for market, handling and marketing their products for interstate and foreign commerce. It permits them to make any agreement that they see fit to make. In other words, it permits one of these associations, if necessary, to combine with another interstate association . . . It permits one association, if necessary, to make an agreement with all other existing associations not to sell to a single commission merchant that sells below a certain price. It is possible, if it is the intent of the framers of this bill, to simply permit the formation of an association or corporation for the purpose of marketing, to say specifically in this bill that the other provisions relating to what these associations shall do after they are formed shall be subject to the provisions of the Sherman Antitrust Act.

The role of the Secretary of Agriculture as being primarily responsible for enforcement of the antitrust laws vis-a-vis farmers was brought out again by Congressman Sumners of Texas, a member of the House Judiciary Committee (61 Cong. Rec. 1042):

> This bill is intended to permit farmers to organize and have central selling agencies through which they may operate. I want to say to my friends on this side who are fighting this bill that if you destroy this bill, if the representatives of these agricultural organizations know what they are talking about, you are going to put them up against prosecutions from district attorneys all over this country. Under this bill it is proposed that the Secretary of Agriculture, representing all the people in this country, presumed to be familiar with the problems of agriculture, will be able to cooperate with these agricultural associations, helping them to build a greater strength for themselves; at the same time, when they put the prices up too high, instead of jumping on them and putting their members in jail, in the first instance, he will say to them, "The prices are too high; you have got to back up." And if they do not do so, he will then bring suit in the district court, where the farmers will have the same right to defend as they would have in the event of prosecutions brought in the first place. The judgment, if gotten, will be one of injunction, and not for crime. This may not work, but the farmers want to try it, and the committee has not been able to devise anything better which would have a chance to pass the Senate, and it is doubtful if we can get this by.
>
> * * *
>
> Mr. Lankford. Do you favor section 2 in order to get the bill through?
>
> Mr. Samners of Texas. I favor it because it is necessary to get it through, and there must be some sort of public control. The farmers themselves recognize that. We must not deny the people the necessary power to do the necessary things for fear they may abuse it. The thing to do is to give them the power, and then give the public a chance, too; and that is what this bill does. This is not a perfect bill. It is

> the best we can do. The agricultural situation is desperate, and we ought to do the best we can do and do it now. It is a choice between giving the Secretary of Agriculture, the Department of Commerce, or the Department of Justice original supervision. The farmers prefer the Secretary of Agriculture, and I see no reason why the public should object to his designation.

Congressman Hersey, also a member of the Judiciary Committee, stated that this bill would exempt farmers from the antitrust laws (61 Cong. Rec. 1043):

> Mr. Speaker, this bill exempts farmers' cooperative marketing associations from the provisions of the Sherman antitrust law and the Clayton Antitrust Act.
>
> • • •
>
> The value of such farm organizations to the producers of agricultural products is beyond estimate. By such organizations the farmers of this country can work and think together. It creates a civic force in large farming communities which protects the farmers, both for the present and for the future. They can thereby operate together in buying seed, fertilizer, farm machinery, and everything needed for the conduct of the farm.
>
> They can work and act together in marketing their products, both in the local and in all markets of the world. The small farmer is assisted in his efforts to hold or market his crops. It does away with the middleman, the speculator, and the importer; in brief, it enables the producers to act together for their mutual interests in the planting, care, and marketing of agricultural products.

Just prior to passage of the bill by the House, Congressman Volstead made the point that while the effect of the bill was to remove the threat of criminal prosecution of farmers' organizations, Section 2 would provide a remedy through the Secretary of Agriculture, and that the farmers approved such control. He stated (61 Cong. Rec. 1044):

Section 2 has the entire approval of the farm organizations. It has been submitted to the attorneys for these organizations, and they have expressed not only an entire willingness that it go into the bill, but they have expressed their desire that it remain in the bill. I want this House to understand that whoever votes to strike out section 2 will vote against what the farmers want; and it is perfectly evident to any lawyer that it is an advantage to the farmers to have section 2 in the bill, not only for the reason expressed by the gentleman from Texas [Mr. Sumners] a minute ago, but because in the event that there is a complaint against them they will not be subject to criminal prosecution if their organization is permitted by this bill, but an investigation will be had before the Secretary of Agriculture, who is given power to deal with the matter. Corporations are very seldom indicted but proceeded against in a civil action substantially the same as we authorize against these associations. I have consulted with representatives of the various farm organizations, and the question has been carefully discussed by them and their lawyers, and there is no question but that a man who votes against section 2 votes against what the farmers of this country want. I believe section 2 ought to stay in this bill, not only because they want it, but because without that section the bill would be unfair to the public, and we ought not to pass anything that would be unfair to the public. With that provision in the bill, it seems to me it will give to these organizations a status of equality with other business concerns, and that is all the farmers ask. They will take care of themselves if you will give them that.

* * *

Mr. Sumners of Texas. I want to ask the gentleman from Minnesota if he thinks that without section 2 this bill has any chance to pass the Senate?

Mr. Volstead. I do not think so, and I do not think it ought to.

The bill thereupon passed (61 Cong. Rec. 1046).

5. Senate Consideration in the 67th Congress

H.R. 2373 as amended by the House was referred to the Senate Judiciary Committee (61 Cong. Rec. 1058) and thereafter reported with amendments on July 27, 1921, in Senate Report 236 (61 Cong. Rec. 4332). The Report presented by the Committee's Chairman, Senator Walsh of Montana, proposed deleting Section 2 in its entirety and adding to Section 1 the following amendment:

> Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the act entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, on account of unfair methods of competition in commerce.

Explaining the amendment, the Senate Report stated:

> The foregoing is a reproduction of the House bill, omitting therefrom section 2, and adding thereto the provision to guard against the establishment of a monopoly, in substance like the amendment proposed by this committee and adopted by the Senate to a like bill which passed the House at the last session. . . .
>
> The hearings conducted by the subcommittee have confirmed the members thereof in the conviction that the amendment insisted upon by the Senate at the last session is essential for the protection of the consuming public and can do no possible harm to the great body of farmers in whose interest the legislation is demanded.
>
> Inasmuch as it is utterly impossible to establish a monopoly of any of the ordinary farm products, cereals, cotton, livestock, etc., and inhibition of monopoly must be unobjectionable to the producers of such. Moreover, your committee is entirely satisfied that they have no desire or purpose to establish a monopoly. Why anyone should insist, under these circumstances, on the enactment of a law which, in terms, would authorize them to do so, your committee finds it impossible to understand.

It is possible, however, to establish a monopoly with respect to farm products which can be produced profitably only in a very limited area, or in the case of highly perishable products, like milk, which will not stand shipment long distances. It would not be in the public interest, your committee believes, to permit all producers of milk within the area from which one of our great cities is supplied to effect a single organization having thus a monopoly which might or might not be utilized to exact extortionate prices of consumers. Your committee sees no good reason why two, three, a half dozen, or a dozen cooperative associations might not properly be organized for the purpose of supplying a city with its milk, nor why, in the case of raisins, for instance, produced only within a limited area in the State of California, a monopolistic organization should be permitted and encouraged, rather than two or three cooperative associations organized and operating on similar lines.

Section 2 of the House bill has for its purpose the alleviation of the evils of monopoly, or those that may follow from authorized combinations, by the granting of something like supervisory control to the Secretary of Agriculture. It was quite generally understood by the committee when the bill was before it at the last session that this section gave to the Secretary of Agriculture the authority to fix prices. The proponents of this bill, however, repudiate that idea and insist that it is not the proper construction of the bill, and assert that they are resolutely opposed to reposing such power in the Secretary of Agriculture. They assert that the bill gives to the Secretary power to declare that a price charged is unreasonable, but gives him no power to fix what is a reasonable price. It is quite likely that even if he were given power to determine what is a reasonable price the provision would be inoperative, as conditions might so change pending a hearing as that the result arrived at would be eminently unjust so far as prices for the future are concerned. However that may be, the experience of the Interstate Commerce Commission under a similar provision, giving it power to determine what is an unreasonable rate but no power to determine what is a reasonable rate, satisfies your committee that as this

provision is construed by the proponents of the bill, and perhaps correctly, it is utterly valueless. If competition is preserved—that is to say, if no monopoly can exist under the act—regulatory provisions are superfluous.

Debate in the Senate on H.R. 2373 commenced at the beginning of the Second Session of the 67th Congress (62 Cong. Rec. 2048 et seq.). Senator Kellogg, who had been a member of the Judiciary Committee in the 66th Congress, sharply opposed the Committee's attempts to amend the House bill. As floor leader for the House version, he opened the Senate's consideration of H.R. 2373, detailing its history in the prior Congress which had resulted in the disagreement of the two chambers (62 Cong. Rec. 2048-9). He urged the Senate to disagree with the substitute proposed by the Judiciary Committee and to adopt the measure as passed by the House except for an amendment to be offered by Senator Capper. After describing Section 1 of the bill, Kellogg stated (62 Cong. Rec. 2049):

> Now I come to the features for the protection of the public in the event that any restraint of trade or monopoly unduly enhances prices, for, after all, the principal object of the Sherman Act is to prevent great organizations of capital and business from getting control of the business of the country and enhancing prices to the damage of the public.

He outlined the powers which the House bill would give to the Secretary of Agriculture and explained why the Secretary, rather than the Attorney General, should administer the antitrust provisions which would relate to agriculture. His remarks left no question but that the Secretary of Agriculture would be exclusively responsible for initiating antitrust proceedings against farmers (62 Cong. Rec. 2048-2049):

> The first question which has arisen is why the Secretary of Agriculture should be named as the officer to find whether the association has unduly enhanced

prices. I know of no officer more competent to deal with the question than the Secretary of Agriculture. He has in his department a Bureau of Markets. He keeps track of the cost of production, the cost of selling, and what the public is paying. He has the statistics and he; through his Bureau of Markets, can determine better than any other agency of the Government whether such a cooperative marketing association is really being operated in restraint of trade as a monopoly and is unduly enhancing prices.

The Attorney General has the duty placed upon him to take charge of the suit in the court to prosecute it, but the Attorney General has not the machinery to study these cooperative associations, to find out the cost of production, the cost of selling, the reasonable prices to the consumers, and various other elements which it is easy for the Secretary of Agriculture to find out.

It may be said, therefore, that before such associations can be prosecuted under the Sherman Act for any restraint of trade or monopoly, whether it is a mere technical monopoly, or not, the Secretary of Agriculture must investigate and make a finding that the cooperative association is in restraint of trade or is a monopoly and is unduly enhancing prices.

The ensuing colloquy made it clear that farmers' cooperatives were to be absolutely immune from antitrust prosecution originated by the Department of Justice (62 Cong. Rec. 2049):

Mr. King. It is intended, then, as I understand the Senator, to make all such organizations absolutely immune from criminal prosecution.

Mr. Kellogg. They are immune from criminal prosecution, and I think they ought to be. I have never known much to be accomplished by criminal prosecution under the Sherman Act; if anything, very little.

Mr. King. It denies the right of the Attorney General to initiate proceedings, even though he should believe from uncontrovertible evidence that a monopoly stupendous in character and oppressive in results

exists by reason of combinations of the character contemplated.

Mr. Kellogg. The Senator understands from the statement I made that the Attorney General can prosecute suits instituted by the Secretary of Agriculture.

Senator Kellogg then went on to state his specific objection to the Senate substitute (62 Cong. Rec. 2050):

> The Senate substitute proposes, therefore, that if there is an attempt to monopolize, or a technical monopoly, whether it has been of benefit to the public or not, if it is a mere technical monopoly, or an attempt to create a monopoly, the association is subject to all the pains and penalties and prosecutions provided for in the Sherman Antitrust Act.

Senator Kellogg addressed himself to the argument that under the House version, without the Senate amendment, some cooperatives might monopolize local commerce. While acknowledging the possibility of this in some agricultural products such as milk, he saw no reason "to hold the sword and the threat of the Sherman Act" over all farmers (62 Cong. Rec. 2053):

> It is claimed, however, that there are some products of local production and sale which might be monopolized, and the monopoly become of great danger to the public. For instance, fluid milk, I believe, can only be shipped economically four or five hundred miles. It is claimed that raisins, which I understand are raised principally in two or three counties in California, can be monopolized by the selling associations of farmers in the counties where the fruit is produced. But, Mr. President, because there are a few products of which the committee feel there is danger of monopolization, they propose to hold the sword and the threat of the Sherman Act over all the farming activities of the country, and subject them to unreasonable prosecution and harassments in order to protect the public in a few articles. This bill furnishes ample protection against undue exactions in those articles which it is claimed may be monopolized.

Senator Capper wholly endorsed Senator Kellogg's analysis (62 Cong. Rec. 2057). He went on to describe the economic realities that would be obliterated by adoption of the Senate amendment (62 Cong. Rec. 2058):

> . . . this proviso nullifies the act, as no association can efficiently operate that does not control and handle a substantial part of a given commodity in the locality where it operates. Middlemen allege that farmers in selling their products individually are competitors with each other, and that by combining into associations to market collectively such competition is eliminated and the farmers thereby undertake to form a monopoly. Though it is conceded that the inevitable effect of cooperative marketing is to lessen competition between farmers, it nevertheless remains that farmers must market collectively or, in the more correct sense, they can not market at all, but must usually turn over their products to a noncompetitive buyer who operates the only elevator or milk station accessible to the farmers in that locality.
>
> • • •
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> The bill as it passed the House, and which I hope will have the approval of the Senate, gives to consumers a protection which they do not now have as against middlemen, in that if such farmers' marketing associations unduly enhance prices a complete and adequate remedy is provided in section 2. If such associations unduly enhance prices, the Secretary of Agriculture may order them to cease and desist from monopolizing and restraining trade and commerce. This provision of section 2 is taken from the Federal Trade Commission Act, and the Secretary of Agriculture can, as the Federal Trade Commision has repeatedly done, issue orders to cease and desist from specific acts. But if the bill is enacted into law in the form reported by the committee it will be a trap for the farmers and in no sense a measure of relief.

Senator Walsh, chairman of the Senate Judiciary Committee, told his colleagues that the only substantial difference between the Senate and House versions was

"whether we should authorize . . . the creation of or the attempt to create a monopoly" (62 Cong. Rec. 2122-3):

> The question as to where the revisory authority should be placed was not a matter of very serious consideration. The bill went to conference, and the conference was unable to agree, the Senate conferees insisting upon that amendment proposed by them, to the effect that nothing in the act was to be deemed to authorize the creation of or the attempt to create a monopoly, and that, Mr. President, is the only substantial difference now, the only real subject of contention between the bill as it passed the House and now before us, and the Senate substitute, namely, whether we should authorize, under the protection of this act, the creation of or the attempt to create a monopoly in the products to which the bill refers . . .
>
> So that the sole matter of difference—in substance, the sole question for determination—is the question as to whether we shall authorize the setting up of monopolies under the protection of this bill. That is the one question for the Senate to determine.
>
> The Senate committee insists that we shall not authorize that to be done. I understand the position of Senators on the other side to be that we shall, and that is a plain statement of the issue between us.
>
> Mr. Pomerene. Mr. President, am I right in this, then, that the difference between the two is that under the House bill, if I understand the Senator correctly, there may be a monopoly, but subject to regulation—
>
> Mr. Walsh of Montana. Exactly.
>
> Mr. Pomerene. And under the Senate Committee bill there may be a monopoly, but without any regulation.
>
> Mr. Walsh of Montana. No; the Senate committee bill forbids monopoly utterly.
>
> Mr. McNary. I agree with very much that has been said by the distinguished Senator from Montana, but in view of the provisions in the Senate committee amendment which the Senator has just read, may I inquire what rights are given to these associations that they do not now have under existing law?

Mr. Walsh of Montana. . . . The Sherman Act in its important provisions deals with two problems. It penalizes two different things. Section 1 of the Sherman Act forbids any combination, contract, or conspiracy in restraint of trade. Section 2 forbids monopolies and penalized monopolies wherever they may exist. . . .

The answer to the Senator from Oregon is that it is our purpose to relieve these associations from all possible risk of being prosecuted under section 1 of the act, but not under Section 2.

Senator Walsh indicated that his fear of monopoly was confined to products "produced only within limited areas" and which had to be consumed within a limited distance from their place of production. Milk was his prime example (62 Cong. Rec. 2156):

Mr. President, at the last session of the Senate I pointed out that the only substantial difference between the House bill and the Senate bill arises over the question of whether the Congress shall expressly authorize the establishment of monopolies under the protection of the statute which it is proposed to enact; also that a limitation of the scope of the act so as to exclude the organization of monopolies is a feature that is of no consequence whatever to the producer of the ordinary line of farm products. A provision of that kind could not possibly affect him in any way whatever. The grower of grain, the grower of cotton, and the producer of potatoes would look with entire indifference upon a provision of that character. It would affect only those articles which are not widespread in the territory in which they are produced; articles that are produced only within limited areas, like raisins, or commodities that will not stand shipment, like milk, that must be produced within a limited distance from the centers in which they are consumed. To those people and with reference to those products the provision which gives rise to the difference between the two Houses, the prohibition of monopoly, is a matter of very great consequence as, in my judgment, it is to the consumers of those products throughout the country.

Senator Walsh went on to state that (62 Cong. Rec. 2156):

> both bills would authorize the organization of associations among farmers to make butter of their product or to make cheese of their product or to make condensed milk of their product, and to put the product on the market.

Senator Pomerene expressed grave concern lest the authorization of cooperative marketing without Sherman Act inhibitions might (62 Cong Rec. 2157):

> to use an extreme and impossible case in order to illustrate what is in my mind . . . raise the price of milk to 25 or 30 cents a quart under a combination.

Senator Walsh replied:

> Mr. President, that is the matter to which I am endeavoring to challenge the attention of the Senate—the possibility of the organization of combinations under this bill, entirely monopolistic in character, which would exact such prices from the consumers, particularly of milk, as to bring the whole movement for cooperative marketing into disfavor and disrepute and have such a corrosive effect as to wipe out any statute that we may enact in relation to the subject.
>
> Now, Mr. President, I want to call attention to the fact that the only people who came before the committee in relation to this bill, other than the representatives of the farm organizations in the city, were representatives of the California Raisin Growers' Association, a confessed monopoly, and the representatives of the milk producers' associations, who frankly stated their purpose to set up a monopoly of the supply of milk to the great cities of the country under the provisions of this bill, if they shall be permitted so to do.

Senator Walsh quoted extensively from the hearings on the bill. His point was that monopolistic organizations were expressly contemplated by the proponents as being "to the advantage of the general public." Expressly discussed was the "hypothetical" example of a cooperative

formed by all of the milk producers in Virginia and all of the milk producers in Maryland, who would "combine and eliminate all competition" (62 Cong. Rec. 2157-2158):

Mr. Walsh of Montana. I read from page 39 of the hearings:

"Senator Walsh of Montana. Just before you go to that, Mr. Lindsay, will you give us some concrete case in which, in your judgment, it would be advisable in the public interest to permit the creation of a monopoly under this bill."

He was arguing that a monopolistic organization under this bill would be to the advantage of the general public.

* * *

Mr. Lindsay. Take, for instance, the milk producers of a certain district.

Senator Walsh of Montana. Take the country tributary to the city of Washington, for instance.

Mr. Lindsay. Yes; the country tributary to the city of Washington. Of course, there can be no object in people associating themselves together unless it is going to be in some way for their benefit. Suppose the milk producers of the city of Washington, in the District of Columbia, deeming it to be for their best interests and for their benefit, form themselves into an association in which they all join, in order to regulate, we will say, the milk industry here. I can not go into the details of how they would be benefited by different methods of regulation. It might have to do with the sanitary conditions surrounding the milk.

Senator Walsh of Montana. Let us take the thing in a practical way. The states tributary are Maryland and Virginia?

Mr. Lindsay. Yes.

Senator Walsh of Montana. We had a witness before us here who told us that the milk producers in Virginia marketing their product in Washington have an association. It is a mere voluntary association for consultation and conference. They do not handle

their product at all. Each of them sells his product to distributors in the city here, of whom there are several. But let us assume that they do not like that system, and they extend their organization so that all of the milk producers over in Virginia may join in an association and they set up a central agency here for the distribution of their entire product and distribute the avails after the manner of your association or the California Fruit Growers' Association.

Mr. Lindsay. Yes, sir.

Senator Walsh of Montana. Over here in Maryland they have another organization of the same character, of the milk producers in Maryland marketing their product in the city of Washington. These two organizations are here competing in the District of Columbia; the Maryland organization has its central distributing point and the Virginia organization has its central distributing point; and the two are competing.

Now, however, they combine and eliminate all competition, so that the consumers of milk in the city of Washington have just one association from which they can supply themselves. What I want to know from you is how the public is benefited by permitting these two associations thus to combine.

Mr. Lindsay. Unless, in the wisdom of the Congress, the general interests of the public as a whole, both the producer and the consumer, may be advanced by the passage of a law like this, then it should not be passed.

In response to questioning, Senator Walsh expressed outrage at the prevailing high milk prices (62 Cong. Rec. 2159):

Mr. Jones of New Mexico. I ask the Senator if the statement which he has just read to us does not indicate that there is either a monopoly or some gentlemen's agreement which enables the distributors of milk in the city of Washington to keep up the present prices, and to make the large profits which he has just recounted to us?

Mr. Walsh of Montana. I dare say it points to that conclusion. I refer to it simply for the purpose of

showing that outrageous exactions might be made through the organization of such an association as the Senate substitute seeks to prevent, and the advocates of the bill as it passed the House insist should be permitted to operate.

Senator Walsh's objection to the House bill was that it would entirely immunize monopolies except where they unduly enhanced prices, in which limited circumstance the Secretary of Agriculture would have jurisdiction (62 Cong. Rec. 2161):

> Mr. President, I hope that the Senators who are following the discussion will consider this provision, first, as it applies to the case of a monopoly; and, second, as it applies to undue restraint of trade, each of them enhancing prices. It will be observed that by the express terms of the bill the monopoly is entirely immune; it is allowed to go on without any let or hindrance at all unless it unduly enhances prices, in which case it may be hailed before the Secretary of Agriculture. When it is brought before the Secretary of Agriculture, what does the Secretary of Agriculture do? He finds that it is a monopoly, we will say, for the purpose of the discussion, and he finds that it unduly enhances prices.

Senator King questioned the application of the bill to a situation in which the milk producers of Maryland and Virginia would combine into one organization but, because of the availability of milk from other states, would not technically be a monopoly. Senator Walsh replied that under the Senate bill this would amount to a prohibited monopoly because of the fact that milk markets are generally coextensive with large population centers, and the availability of outside milk is of negligible importance (62 Cong. Rec. 2163):

> Mr. King. Mr. President, it is obvious that there would not be a monopoly in, perhaps, the technical sense if the milk producers of Maryland and the milk producers of Virginia were furnishing the city of

Washington with milk and they combined, because there would be West Virginia and Pennsylvania and Ohio and other places remote from Washington to which resort might be had; but, of course, by the time they got the milk here it would make the price so high that it would give to the Virginia and the Maryland milk producers a monopoly.

Mr. Walsh of Montana. Exactly; and then a practical monopoly would exist, which would be in violation of the law. Of course, everybody will appreciate that as far as milk is concerned you can consider that there is a certain basin around each great center of population, from which basin the milk naturally flows into that center, and if you organize all the producers within that basin into one body, then you have a monopoly of the supply, even though by some extraordinary effort you can induce some of the farmers residing beyond that to bring their milk into the center which is thus monopolized. Of course, naturally they belong in the basin of some other city. They have their association there, and it would be difficult to break their business ties and business associations to bring them in. Mr. Miller suggested that it could flow in freely from the outside country. It will not flow in freely from the outside country, because they already have their business ties and business associations, which will prevent the flow.

Senator Walsh explained how even under the Senate bill, with its Sherman Act limitations on monopoly, cooperatives could perform the functions of processing and distribution which middlemen or corporations now performed (62 Cong. Rec. 2163):

That is just exactly what we want to do by this. We want to allow a lot of farmers, instead of bringing their milk into a cheese factory run by private capital, selling their milk to the corporation which runs that cheese factory, to be permitted to associate themselves together—which, of course, would eliminate competition between themselves—build their own cheese factory, bring their milk to that cheese factory, sell the cheese, and divide the profits. That is what this bill

is for. It is urged that you can not do that because Jones, who is now selling milk to the cheese factory owned by a private individual, competes with Smith, who sells his milk to the cheese factory, and competes with Robinson, who sells his milk to the cheese factory, and if these three men combine they eliminate competition between themselves, and therefore they fall under the condemnation of section 1 of the Sherman Act. Does the Senator want to prevent them from doing that?

Mr. King. No.

The debate then returned to the critical issue of monoply (62 Cong. Rec. 2164-6):

Mr. Walsh of Montana. Of course, monopolies as a usual thing are created by combinations, two or more or half a dozen corporations uniting in one, and they establish themselves as a monopoly by unfair methods of competition. Of course, if these associations shall practice unfair methods of competition for the purpose of driving their competitors out of business I daresay they would still be amenable to discipline under the Federal Trade Commission act; at least I hope so.

But, Mr. President, that is not the situation which presents itself at all. The Federal Trade Commission will take care of all these unfair methods of competition by its processes. But I want Senators to face the situation. Let us turn again to the milk producers in the State of Virginia and in the State of Maryland. They do not resort to any unfair practices at all. They simply organize themselves, and they all unite in one association under the protection of this act; they set up their own distributing system in the city of Washington.

Of course, the private distributors must go out of business. They can not any more get any milk from anybody, at least unless they go beyond the territory which would ordinarily supply the city of Washington, and, of course, they must compete under disadvantageous circumstances, and they would naturally fall. So the association does not resort to unfair practices at all, but it gets every man who is supplying milk naturally to the city of Washington into one associa-

> tion, and then it charges an unreasonable price, and the Secretary of Agriculture finds that the monopoly exists, and that it has unduly enhanced prices. What is he going to do? According to the contention they make he can not fix the price at which that association shall sell its milk. They are commanded to desist therefrom. What can he do?

After some confused discussion about the Secretary of Agriculture's price fixing power, the issue came into focus (62 Cong. Rec. 2167-68):

> Mr. Cummins. The Senator from Minnesota suggested, as I recall his observation, that after the Secretary of Agriculture acted under section 2, the Sherman law would be in full force as to that corporation or association. I do not quite understand that. If I correctly interpret the decisions, as well as the law itself, restraint of trade is unlawful, no matter whether it increased or decreases prices. Monopoly is unlawful, no matter whether its effect may be to increase or decrease prices. Does the Senator from Minnesota mean to say that the Sherman law, then, could be applied in its full force to a corporatoin condemned by the Secretary of Agriculture?
>
> Mr. Kellogg. No; I did not say so. I said that if the Secretary of Agriculture found that the restraint of trade and the monopoly had gone to such an extent that the price of agricultural products was unduly enhanced, he could make an order against the restraint of trade and the monopoly, and if he brought a suit to enforce that, the court could apply any remedy against that particular monopoly and restraint of trade that it could now apply under the Sherman Act—that is, in the same form. To make that perfectly clear, the Senator from Kansas [Mr. Capper] offered an amendment, on page 3, line 13, of the bill, to insert, after the word "order," the following:
>
> "Or enter such other decree as the court may deem equitable."[1]

[1] The amendment was subsequently adopted by voice vote (62 Cong. Rec. 2275-6).

I think that is what the bill means anyway. In other words, the court would not be limited to compelling anybody to reduce a price.

* * *

. . . it can restrain the acts of undue restraint of trade or any of the acts in which the corporation may be engaged which have unduly enhanced the price. For instance, the corporation may have made contracts with all of its customers or with all of its members that they would sell only at such a price. That price may constitute, with the other acts, a monopoly. The court may make an order against the contracts, or it may give any relief in the premises that it thinks proper.

Mr. Cummins. Does the Senator think the Secretary of Agriculture can do that also?

Mr. Kellogg. The Secretary of Agriculture can make the order against it. He can not, of course, enforce it. The court must do that.

Senator Walsh concluded the discussion by urging that the issue of price fixing be eliminated by making the bill flatly prohibit monopolies rather than merely forbidding those that unduly enhanced prices (62 Cong. Rec. 2168):

In other words, I insist, Mr. President, that there is no occasion whatever for reposing this extraordinary power, this unusual power, in the Secretary of Agriculture or in any other official or body. Just cut out the matter of monopoly and it will be taken care of. Let them organize and let them form their associations without any peril at all, just so long as they do not attempt to monopolize the products.

Senator Sterling, a member of the Judiciary Committee, criticized the Senate substitute because it would no nothing more than invite prosecution of farmers for monopolizing or attempting to monopolize. In his view, the same evidence which could be adduced under a charge of combination or conspiracy in restraint of trade could also be adduced in support of a charge of monopoly or attempt. Hence the Senate substitute would undo the whole purpose

of exempting farmers from antitrust prosecution (62 Cong. Rec. 2218):

> Mr. Sterling. What does the substitute do? The first part of it, of course, is practically the same as part of section 2 of the original House bill, but the rest of it, that which provides that nothing herein shall be construed to exempt from procedure as for a violation of the law against monopoly—such is the substance of it—upon its face invites a prosecution as for the offense of monopolizing or attempting to monopolize. Ambitious United States district attorneys or persons envious of or feeling that their business might possibly be injured by a company or an association of farmers would be quick to seize upon section 2 of the Sherman Antitrust Act for the purpose of instituting a prosecution . . . Hence my reason for saying, as I said at the beginning, that the same evidence to be adduced in a charge that there has been a combination or contract or conspiracy in restraint of trade may be adduced in support of a charge that there is a monopoly or that there has been an attempt to monopolize. I think we can see the evil now of adopting the proposed substitute, which is ostensibly for the purpose of preventing monopoly. A man who desires to prosecute a combination or association of farmers has only to say, "There is here an attempt to create a monopoly" and he produces the evidence; and he would have produced the same kind and class of evidence had the charge been that there had been an agreement in restraint of trade and commerce

Senator Walsh offered a two part amendment to the House bill which would have required a cooperative to admit any qualified person to membership and in addition would forbid an association from dealing in the products of nonmembers to an amount greater than is handled for members. He explained (62 Cong. Rec. 2267-8):

> Senators will bear in mind that the bill as they are asked to give it their approval authorizes the farmers to go so far with their organization and to get so many producers in it as to constitute a monopoly of the particular product in which they are interested, so that all

other producers of that particular community will be obliged to leave the field. As in the case of the raisin growers, those who are left outside of the monopolistic organization may constitute a mere modicum and they will have no way of getting their products on the market at all. If they do not want to organize a separate association or if they are so few in number that they can not do so profitably they ought to be permitted to come into the monopolistic organization upon exactly the same terms as their neighbors are admitted to membership. It ought not to be placed in the power of this monopolistic organization to drive out of existence and out of the business in which they are engaged the men who do not happen to come in until the association embraces a sufficient membership to constitute a monopoly of the business. It should be borne in mind, Mr. President, that it is proposed to give them the power to organize until they have a sufficient membership to enable them to control the market and have no competitor whatever. Of course, if they care to exercise the power, then they can kill off every other man who is engaged in the same business and who has to market in the same place.

The first part of the amendment was rejected (62 Cong. Rec. 2268) while the second was adopted (62 Cong. Rec. 2269).

Senator Lenroot then offered an amendment to resolve any ambiguity as to the scope of the order to be issued by the Secretary of Agriculture. H.R. 2373 had stated that after a finding of monopolization and enhanced price, the Secretary could order the cooperative "to cease and desist therefrom." The Lenroot amendment proposed striking the word "therefrom" and inserting "from monopolization or restraint of trade." He explained (62 Cong. Rec. 2269):

> . . If this amendment is adopted, this result will follow: If the Secretary of Agriculture finds that there is a monopolization or restraint of trade, and also an undue enhancement of price, then under the bill as it would read if amended he is directed to issue an order, not against the undue enhancement of price, but against

> the monopolization or restraint of trade. In other words, when these facts exist the order goes against the monopoly, against the restraint of trade, and the command will be that they must desist from such monopolization or restraint of trade; and a mere abandonment of the undue enhancement of price will not be a defense.

To Senator Norris' objection that an order against monopolization might cause dissolution of the cooperative, Senator Lenroot observed (62 Cong. Rec. 2270):

> But Mr. President, if a monopoly should exist in such cases, and if that monopoly be used for evil instead of for good, why should not the order go against the monopoly? That is the whole question.
>
> So long as that monopoly is not using its power to the public injury it will not be disturbed, but if it does use its power to the public injury, it ought not to be a defense for that monopoly to say, "We will cease charging this particular sum or price for our products, but our monopoly can continue."

The amendment was agreed to (62 Cong. Rec. 2271).

The Senate then turned to a consideration of the Walsh amendment, the committee substitute for Section 2 of the House bill, Senator King, supporting the substitute, thought that the kind of of agricultural conduct which the Justice Department had been prosecuting ought not be legalized (62 Cong. Rec. 2276):

> I have made inquiry and am advised by the Department of Justice that only four prosecutions have been instituted under the Sherman antitrust law against what might be denominated agriculturists, and in each case there was a flagrant attempt to monopolize and to oppress the people.
>
> In the four cases just referred to the defendants sought to create corners or oppressive trusts; their conduct merited condemnation at the hands of the public and punishment under the law. If they had merely sought to associate themselves together for

the purpose indicated by the pending bill, they would not have been prosecuted. Indeed, as I construe the Sherman antitrust law, they would not have been subject to prosecution if they had sought only to do what the present bill authorizes.

When the question of an interstate association of milk producers recurred, a proponent of the House bill urged that the milk supply of a large city "ought to be monopolized just like the gas supply" (62 Cong. Rec. 2277):

Mr. King. Does the Senator think it would be a wise thing for all of the milk producers of one State or a given number of States to be permitted to combine?

Mr. Hitchcock. When it comes to the milk production, the only possible danger that can be considered is of a local monopoly, a local monopoly in any town. My judgment is that the supply of milk of a big city ought to be monopolized just like the gas supply, and its price ought to be in some way controlled. I believe it could be controlled. When I wake up in the morning and hear half a dozen milk carts rattling by my house, I say that is a waste. It would be better to have one milk cart attending to that part of town. One of the reasons why the cost of living is so great in a city is the awful waste of having hundreds of grocery stores doing what a few should do, dozens of milk men doing what a few could do, and every block paraded by half a dozen different ice wagons and milk wagons and supply wagons, so the people who live in that block have to pay that cost of delivery.

The Senate then considered the question of whether the Secretary of Agriculture or the Federal Trade Commission should supervise cooperatives (62 Cong. Rec. 2278):

Mr. King. . . . May I inquire further of the Senator from Montana, or the Senator from Minnesota, what reason there is for selecting the Secretary of Agriculture instead of the Federal Trade Commission as the depositary of the power to enforce the act?

Mr. Kellogg. Mr. President, I explained my views fully in the speech I delivered in the Senate some days

ago. The Secretary of Agriculture has in his department a Bureau of Markets; he has the statistics; he keeps track of market conditions and costs, and has the information before him all the time. The Trade Commission simply makes an investigation of particular cases.

Senator Norris gave his views as to who should supervise (62 Cong. Rec. 2278):

> I have always believed, I will say to the Senator, that the Federal Trade Commission is better equipped to discharge these duties than is the Secretary of Agriculture. The committee, however, thought otherwise, and they may be right. Those who are behind the bill felt differently; they wanted the power reposed in the Secretary of Agriculture. Personally I am of the opinion that the bill would have been stronger if the authority had been reposed in the Federal Trade Commission; but it is not, in my judgment, a question of any very great importance. Some instrumentality, it was thought, must be given the power to carry out the provisions of the bill, and it seems very appropriate to give it to the Secretary of Agriculture in the first instance, with an appeal to the courts. I do not think it is vital at all.

Senator King argued strenuously for giving the regulation of monopoly to the Federal Trade Commission which, he said, could have access to the same market reports available to the Secretary of Agriculture. Then he said (62 Cong. Rec. 2279):

> I shall move to amend by striking out, in line 9, page 2, the words "Secretary of Agriculture" and inserting "Federal Trade Commission," so that it will read:
>
> "That if the Federal Trade Commission shall have reason to believe that any such association monopolizes—"

The amendment was rejected by voice vote (62 Cong. Rec. 2279).

Just prior to the vote on his substitute, Senator Walsh warned again that its rejection would pave the way for uninhibited milk monopolies, controlled in no respect save as to exorbitant prices (62 Cong. Rec. 2279):

> Mr. Walsh of Montana. I wish it to be thoroughly understood, as we proceed to vote, that to reject the Senate substitute and to adopt the House text will be to remove the inhibition from setting up any milk monopoly in any one of the great cities of the country, and with no check upon anything they may do in the way of exacting exorbitant prices from consumers, except as it is provided in section 2 of the bill, the validity of which is open to most serious question. . . .

The vote on the Walsh substitute "was announced—yeas 5, nays 56" (62 Cong. Rec. 2281). Thus the Senate emphatically rejected its own Judiciary Committee's version which would have retained the Sherman and Clayton Act prohibitions and would have granted jurisdiction to the Federal Trade Commission for enforcement.

6. Final Passage by the House

H.R. 2373 was returned to the House with minor Senate amendments. Representative Volstead explained that the Senate amendments made no change in the bill "as we intended to pass it in the House." He then made a final observation on the legislation and its tortuous path through Congress (62 Cong. Rec. 2453):

> In connection with what I desire to say in regard to this legislation, I may be permitted to offer some observations on legislation that this Congress has passed in the interest of agriculture, and to emphasize the need of that industry for relief.
>
> In this industrial depression it has been noticed that the more thoroughly an industry is organized the less it has suffered and the less its prices have been deflated. This was noticeable in the dairy industry, which is more largely controlled by cooperative farm organization than any other branch of industry except

that of certain fruit growers. Milk, cream, and butter have maintained a much higher average of prices than many other farm products. In this country, until within the last few years, farmers have made but little effort to combine, though those with whom they have had to deal are combined in large corporations. At the beginning of the last Congress a bill was introduced for the purpose of giving to the farmers the privilege of combining, so that they might offer their products in cooperation with each other. Hearings were held by the Judiciary Committee, of which I have the honor of being chairman, but the bill failed to receive the necessary support. After consulting with officers of various farm organizations so as to get their views, I drafted a bill which, after being approved by those officers, I introduced and succeeded in passing in the House, but it was so amended in the Senate that in my view it would defeat its purpose, and it consequently failed of passage at that time. I again introduced this bill in the early part of the first session of this Congress and then secured its passage in the House. It has been pending in the Senate for many months. The Senate again sought to amend it, and a prolonged fight was provoked over those amendments.

The House concurred in the Senate amendments and the bill passed by a vote of 276 to 8 (62 Cong. Rec. 2455). Capper-Volstead thereafter became law.

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Nos. 62 and 73

In the Supreme Court of the United States

OCTOBER TERM, 1959

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, APPELLANT

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, APPELLANT

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
ROBERT A. BICKS,
Acting Assistant Attorney General,
CHARLES H. WESTON,
IRWIN A. SEIBEL,
JOSEPH J. SAUNDERS,
RICHARD H. STERN,
Attorneys,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 62

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, APPELLANT

v.

UNITED STATES OF AMERICA

No. 73

UNITED STATES OF AMERICA, APPELLANT

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district court (R. 121–133, 480–496, 504–506) are reported in 167 F. Supp. 45, 167 F. Supp. 799, and 168 F. Supp. 880.

JURISDICTION

The complaint filed by the Government charged the defendant with violating Sections 1, 2, and 3 of

the Sherman Act and Section 7 of the Clayton Act. The district court entered judgment on the charge of violating Section 2 of the Sherman Act on November 10, 1958 (R. 74–75), it entered judgment on the charge of violating Section 3 of the Sherman Act and Section 7 of the Clayton Act on January 22, 1959 (R. 85–87), and it entered judgment on the charge of violating Section 1 of the Sherman Act on January 30, 1959 (R 88). On entry of the judgment of January 30, 1959, the prior partial judgments became final. Rule 54(b), F.R.C.P.

Notice of appeal in No. 62 was filed on March 11, 1959 (R. 89), and notice of appeal in No. 73 was filed on March 23, 1959 (R. 92). This Court noted probable jurisdiction of the appeals on June 29, 1959 (R. 746). 360 U.S. 927. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended, 15 U.S.C. 29.

QUESTIONS PRESENTED

1. Whether the defendant Association's monopolization and attempted monopolization of the Washington milk market by coercive and exclusionary means are immunized from § 2 of the Sherman Act by the Capper-Volstead Act or § 6 of the Clayton Act.

2. Whether the Association's violation of § 3 of the Sherman Act and of § 7 of the Clayton Act, as found by the district court, are within any immunity given by the foregoing statutory provisions.

3. Whether the provision of § 7 of the Clayton Act that its prohibitions are not applicable to transactions consummated pursuant to authority given by the Sec-

retary of Agriculture validates the Association's acquisition of the business and assets of Embassy Dairy, Inc.

4. Whether the relief ordered by the district court was adequate.

STATUTES INVOLVED

The pertinent provisions of the Sherman Act, the Clayton Act, and the Capper-Volstead Act are set forth in the Appendix, *infra*, pp. 54–58.

STATEMENT

1. *The district court proceedings.* This is a civil proceeding brought by the United States on November 21, 1956, against the Maryland and Virginia Milk Producers Association, Inc. ("the Association"). The Government's amended complaint charged:

(1) That continuously since about 1930 the Association has attempted to monopolize, and has monopolized, by predatory and exclusionary conduct, trade and commerce in supplying raw milk to dealers in the Washington metropolitan area,[1] in violation of § 2 of the Sherman Act (R. 17–18);

(2) That continuously since about April 1954 the Association and certain co-conspirators have been engaged in a combination and conspiracy to eliminate competition in said area with the Association and with dealers purchasing milk from it: (a) by effecting acquisition by the Association of substantially all the

[1] This area was defined as comprising Montgomery and Prince Georges Counties, Maryland, the District of Columbia, and Arlington and Fairfax Counties and the cities of Alexandria and Falls Church, Virginia (R. 14).

assets of Embassy Dairy, Inc. (a Washington metropolitan area dealer), (b) by obtaining the co-conspirators' agreement not to sell milk in that area for a period of ten years, and (c) by undertaking to force milk producers who had been supplying Embassy to become Association members if they wished to sell their milk to Washington metropolitan area dealers, in violation of §§ 1 and 3 of the Sherman Act (R. 18–21); and

(3) That the effect of Association's acquisition of Embassy's assets has been or may be substantially to lessen competition, or to tend to create a monopoly, in the sale of raw milk to, and the sale of pasteurized fluid milk by, Washington metropolitan area dealers, in violation of § 7 of the Clayton Act (R. 21).

Following pre-trial proceedings (R. 97–120), the filing by the Government of particulars concerning its charge of monopolizing and attempting to monopolize in violation of § 2 of the Sherman Act (R. 35–58, 68–74), and the filing of stipulations that certain depositions and documents would be received in evidence (R. 59, 65–66), the district court decided that it would initially pass upon the affirmative defense pleaded in the Association's answer, namely, that all the activities charged against it were given exemption from the antitrust laws by § 6 of the Clayton Act and the Capper-Volstead Act.

In an opinion rendered on October 16, 1958, the court held that the Association was an agricultural cooperative within the meaning of these statutes (R. 121, 125–126). It further ruled that the statutes give such a cooperative absolute exemption from the anti-

trust laws "as to all of its activities", absent combination or conspiracy with persons not producers of agricultural commodities (R. 131). Under this view of the governing law, the court held that there was no cause of action under § 2 of the Sherman Act and that the § 2 charge should be dismissed, but that the charges of violating §§ 1 and 3 of the Sherman Act and § 7 of the Clayton Act were not within the claimed exemption and should be tried (R. 132–133).

After the court had decided that the charge of violating § 7 of the Clayton Act should be tried first and independently of the remaining Sherman Act charges (R. 175–176, 181), and after trial of the Clayton Act charge, the court on November 21, 1958, rendered an opinion holding that this charge had been established (R. 480–495).[2] The parties then stipulated that the charge of violating §§ 1 and 3 of the Sherman Act should be decided on the evidence introduced on the Clayton Act charge, and the court, after hearing argument, held that the evidence established violation of § 3 (R. 504–506).

The court entered three judgments. The first dismissed the § 2 Sherman Act charge (R. 74–75), the second adjudged violation of § 7 of the Clayton Act and § 3 of the Sherman Act and provided for disvesture of the Embassy assets and business (R. 85–87), and the third dismissed the § 1 Sherman Act charge (R. 88).[3]

[2] The opinion recites that it will constitute the court's findings of fact and conclusions of law (R. 495).

[3] Since the basic prohibitions of § 1 and § 3 of the Sherman Act are the same and since the court had adjudged violation of § 3, the Government consented to dismissal of the § 1 charge (R. 88).

In No. 62 the Association has appealed from the judgment (entered on January 22, 1959) that its acquisition of Embassy violated § 7 of the Clayton Act and § 3 of the Sherman Act. In No. 73 the United States has appealed from the judgment dismissing the § 2 Sherman Act charge, and its appeal also attacks the adequacy of the relief provided by the judgment of January 22, 1959.

2. *The marketing of milk in the Washington metropolitan area.* The milk sold in the Washington metropolitan area as fluid milk is supplied by milk producers (dairy farmers) in Maryland, Virginia, Pennsylvania, and West Virginia (R. 14, 27). These producers sell directly or through an agent to dealers (generally called dairies), who pasteurize and process the milk for immediate delivery and sale to consumers, stores, and other outlets (R. 14, 28). The Association, which is an agricultural cooperative organization composed of nearly 2,000 dairy farmer members primarily located in Maryland and Virginia, acts as the marketing agency for its members and sells most of the milk produced by its members to Washington metropolitan area dealers (R. 13, 485). It supplies about 86% of the fluid milk sold by the dealers in that area, of whom there are about a dozen (R. 486).[4] It supplies substantially all of the fluid milk sold by the three largest dealers (Pl. Ex. 27, R. 572–573), but

[4] According to the Association's own figures covering all sales of fluid milk (other than those made under Armed Services contracts) by Washington metropolitan area dealers, dealers having 89% of these sales obtained 100% (in one instance 99.8%) of their milk from the Association (Pl. Ex. 27, R. 572–573).

Embassy, the fourth largest, having about 9.5% of the fluid milk sales, procured its milk from about 120 dairy farmers who were not Association members (R. 486–487).

The price that dealers pay to the Association depends upon the use to which the milk is put. The highest price is for that resold as fluid milk (Class I). There are much lower prices for milk converted into cottage cheese or cream (Class II) and for milk transformed into by-products such as ice cream and powdered milk (Class III), which is known as surplus milk (R. 485–486). All members, however, receive the same amount per gallon from the Association, representing the average amount per gallon obtained by the Association, after deducting the Association's operating expenses and a deduction to maintain a revolving reserve fund. Accordingly, members directly benefit when Class I sales are maximized and Class III sales are minimized (R. 486; Pl. Ex. 22, R. 551).

3. *The Association's Acquisition of Embassy.* On July 26, 1954, Embassy conveyed its tangible and intangible assets to the Association (R. 490–491). The conveyance was pursuant to a purchase agreement dated May 26, 1954, which fixed the purchase price at $2,940,815, plus the estimated value (determined on closing date to be $861,000) of Embassy's accounts receivable and inventories (R. 586, 589, 595). The purchase represented a cash commitment of at least $4,000,000, consisting of cash payments to the seller

of about $3,800,000 and supplying around $300,000 as working capital for Embassy (R. 544, 562).[5]

The district court found that the price paid by the Association for Embassy's assets "was far in excess of the actual and intrinsic value of the property purchased" (R. 491). In fact, the Association paid, and recognized that it was paying, almost double what the assets were worth, that is, over $2,940,000 for fixed assets having a value of only about $1,600,000 (R. 558).[6] The amount paid in excess of the value of property received was set up on the Association's books of account as "Intangible Assets," composed of "Good Will Purchased" ($530,562.67) and "Unamortized Cost of Non-Competitive Agreement" ($1,000,000) (R. 287–288, 623).[7] Since the acquisition, Embassy has been operated by the Association at a substantial loss (see note 17, *infra*, p. 36).

Two agreements which the Association deemed of great importance were incorporated in the contract for the sale of Embassy's assets and business. One was an agreement by the owner of Embassy (James J. Ward) that for a period of ten years neither he

[5] The Association financed the purchase by borrowing about $3,250,000 ($2,100,000 from the Baltimore Bank for Cooperatives, $750,000 from local banks, $407,000 from it own members) and using $748,000 of its own funds (R. 620).

[6] In an appraisal to determine insurable values, made following the purchase, the insurable value of Embassy's buildings was found to be $642,000, and the maximum insurable value of its machinery and equipment $800,000, or a total of $1,442,000 (R. 605–606).

[7] As of December 31, 1954, the latter item was $958,333.33, but the accountant who had supervised preparation of the Association's balance sheet believed that the original entry had been $1,000,000 (*ibid.*).

nor any dairy presently or thereafter owned by him would engage directly or indirectly in the wholesale or retail sale of milk in the Washington metropolitan area (R. 590–591, 597).[8] The other was an agreement by the seller that it would endeavor to persuade its milk suppliers to furnish their milk to a dairy or dairies covered by the covenant not to compete and to persuade those refusing to do this to become members of the Association (R. 590).

The Association anticipated benefits from the Embassy acquisition sufficient to warrant payment of "an extra million over the physical value of these properties in order to get control of them" (R. 555). These benefits were described in Association "memoranda not intended for public consumption" (R. 487). One anticipated benefit was, in the words of the Association, "Elimination of bootlegging, i.e., bringing in cheap uninspected 'distress' milk from other markets", which, even if not sold as "D.C.-inspected milk" in the District of Columbia, "drains off a demand" for milk sold by the Association's dealer-customers (R. 553). Putting a stop to Embassy's operations was deemed important because its "ability to buy cheap milk both from unlicensed sources and from independent Washington producers [*i.e.*, nonmembers of the Association] has cut into the market structure", taken away sales from the Association's dealer-customers, and reduced the Association's Class I milk sales with a consequent estimated loss in reve-

[8] This agreement appears to be the basis for the Association's balance sheet item labeled "Unamortized Cost of Non-Competitive Agreement" (R. 287).

nue to its members of about $700,000 a year (R. 541–542). The Association further declared that purchase of Embassy "will eliminate a disturbing influence which has been a thorn in the side of the Association for many years" (R. 554). The Association viewed Embassy's "ability to under-buy, therefore under-cut in their bidding", as a particularly disturbing market factor with reference to milk sold by contract bidding for use in various Government installations (R. 542).

The Association observed that it supplies "all Washington Dairies except Embassy" (R. 557), that Embassy "had never cooperated" with the Association "and had always looked to other sources of supply" (R. 555), and that the Association's acquisition of Embassy "has the unqualified support of the dealers in the market and they have given full assurance that they will work 100% with the Association the same as they have in the past" (R. 549).

4. *The decision of the district court.* In holding (R. 492) that the Association's acquisition of Embassy's assets violated § 7 of the Clayton Act because it "inescapabl[y]" "tends to lessen competition" and "tends to create a monopoly," the district court stated (R. 491–492) that the acquisition "tended to lessen competition in the milk industry in the Washington market in more ways than one." It pointed out (R. 491) that many independent producers who had been supplying Embassy "were unable to find an outlet for their product in the Washington market unless they were willing to surrender their independent status and join the Association";

that the largest single outlet in the Washington metropolitan area for milk produced by nonmembers of the Association was eliminated; that a portion of the fluid milk supply was diverted from the Washington to the Baltimore market and the amount of milk controlled by the Association was increased; and that Embassy was eliminated as a competitive factor in the sale of milk to the Federal Government so that, immediately following the acquisition, milk of Association members constituted 91.7% of such sales, whereas it had previously constituted only 45%. The court concluded (R. 492) that, "Without doubt, the result [of the acquisition] was that the defendant enhanced its dominating position in the market, even though it did not attain complete control."[9]

In subsequently holding, on the basis of the record made at the trial of the § 7 charge, that the Embassy acquisition also violated § 3 of the Sherman Act, the court found (R. 504–506) that the result of the acquisition "was a foreclosure of competition, in respect to Government contracts and in respect to purchases of milk from milk producers"; that the transaction "was entered into with the intent and purpose of restrain-

[9] The Government also had challenged, in an amendment to the complaint (not printed), the Association's acquisition in December 1957 of the stock of Wakefield Dairy. The court held (R. 495) that the acquisition did not violate Section 7. It ruled (*ibid.*) that since Wakefield was then "hopelessly insolvent," "deeply in debt" and "on the brink of bankruptcy," the acquisition was governed by the rule of *International Shoe Company* v. *Federal Trade Commission*, 280 U.S. 291, that the "acquisition of capital stock or assets of a failing corporation is not within the ban of Section 7 of the Clayton Act." We do not challenge that ruling.

ing trade"; and that the "statutory immunity accorded to agricultural cooperatives" was not applicable.

SUMMARY OF ARGUMENT

The primary question in these cases is the extent to which an agricultural cooperative is immunized from the antitrust laws by the Capper-Volstead Act or § 6 of the Clayton Act. The district court viewed these statutory provisions as conferring complete immunity save in the single situation where a cooperative combines or conspires with outsiders, *i.e.*, those not agricultural producers. The district court, applying this test, dismissed the allegations of the complaint charging violation of § 2 of the Sherman Act and, on the other hand, sustained the allegations charging violation of § 3 of that Act and § 7 of the Clayton Act, and also held, after trial, that the evidence established these violations. Each of these holdings is presently in issue.

I

A. Plainly § 6 of the Clayton Act confers no immunity applicable to the antitrust violations here involved. The section merely gives labor unions and agricultural associations protection against dissolution as illegal combinations in restraint of trade, but no antitrust violation alleged in the present complaint or found by the district court is even remotely rested on the view that the association is in itself an illegal combination in restraint of trade.

B. The Capper-Volstead Act does not confer on agricultural associations any blanket, absolute immunity to monopolize (or to restrain) trade. The Act was

designed to strengthen the bargaining position of those engaged in agricultural production by authorizing them to market their product collectively through membership associations having the attributes of a single legal entity. This is the authorization given by § 1 of the Act. Section 2, which permits the Secretary of Agriculture to institute an administrative proceeding if activities authorized under § 1 result in the price of an agricultural product being "unduly enhanced", is merely a "qualification" of the § 1 authorization, is not "a substitute for the provisions of the Sherman Act", and confers upon the Secretary no primary jurisdiction respecting violation of that Act by agricultural associations. *United States* v. *Borden*, 308 U.S. 188, 206.

The collective marketing through an association operated for the "mutual benefit" of its members, as authorized by § 1 of the Act, legitimates no more than securing such control over local supply as results from voluntary membership in an association by the local producers or most of them. Any control over supply or price obtained by excluding non-member producers from the market, by predatory pricing to achieve this end, or by combining with others to obtain a control over supply or price, which the association could not achieve if it acted singly in collectively marketing the product of its members, transcends the authorization of § 1 and thereby becomes subject to antitrust law prohibitions. This was the effect of the statute as intended by Congress.

In the House, the Committee report on the bill states that if associations which the bill authorizes

"shall do anything forbidden by the Sherman Anti-trust Act, they will be subject to [its] penalties", and that the bill's purpose was to put these associations on a parity with business corporations but not to place them "above the law". This was also the holding in *Borden*, where the Court held that a combined attempt by an agricultural association and various outside interests to control supply and price "finds no justification in § 1" of the Capper-Volstead Act. 308 U.S. at 205. The holding in *Borden* was, not that an authorization (and hence immunity) given by the Capper-Volstead Act had been lost by reason of agreement with outsiders, but that the authorization of the Act did not extend to the kind of trade-restraining and monopolistic practices charged against the association by the indictment.

We submit that the monopolization and attempted monopolization alleged in the complaint, as further particularized by the Government—cutting off access to the market by competitors (non-member producers) and a general foreclosure of competition, by boycotting, refusals to sell, predatory price cutting, credit leverage, etc.—goes beyond any supply-control position implicitly authorized by the Capper-Volstead Act and therefore, like the *Borden* situation, goes beyond any immunity given by that Act. This has been the consistent interpretation of the statute by lower federal courts.

C. The Association's acquisition of Embassy was not a transaction immunized by Capper-Volstead from § 3 of the Sherman Act. The acquisition of a milk dealer does not necessarily exceed the permissible lim-

its of Capper-Volstead. But, on the facts found by the district court, the acquisition—at a price far in excess of Embassy's value—was consummated in order to exclude rival producers from the market and to eliminate a dealer troublesome to the Association's dealer-customers, "with the intent and purpose of restraining trade" and with the effect of "a foreclosure of competition" in bidding on Government contracts and purchases of milk from milk producers.

In the case of a business corporation, such conduct would be in unreasonable restraint of trade, prohibited by the Sherman Act. Since Congress did not intend that the Capper-Volstead Act give agricultural associations a privileged status with reference to the antitrust laws, but simply that they should be placed on a parity with business corporations, the Association's acquisition of Embassy must be deemed not within any Capper-Volstead Act privilege. And the Association has not even contested the court's holding that the acquisition, if not thus privileged, violated § 3 of the Sherman Act.

Equally clearly, the acquisition, if not immunized by Capper-Volstead, violated § 7 of the Clayton Act, which makes it unlawful for a corporation to acquire assets of another corporation where, "in any line of commerce", the effect of the acquisition "may be substantially to lessen competition, or to tend to create a monopoly".

II

We submit that the Association's contention that § 7 of the Clayton Act excludes acquisitions by agricultural cooperatives from the prohibitions of that sec-

tion is without substance. The Association is clearly a corporation "subject to the jurisdiction of the Federal Trade Commission." See the specification of that jurisdiction in § 11 of the Clayton Act.

Nor are agricultural associations excluded from § 7 by virtue of the last paragraph of the section, which exempts transactions consummated pursuant to authorization by certain administrative agencies (including the Secretary of Agriculture) under statutory power to grant such sanction. The last paragraph is inapplicable because the Secretary neither has statutory power to approve the acquisition of corporate assets by an agricultural cooperative, nor had he, as to the Association's acquisition of Embassy, purported to exercise this power. The Association's suggested interpretation of the last paragraph as an outright exclusion of all agricultural cooperatives from § 7, irrespective of the Secretary's approval of or power to approve an acquisition, is inconsistent with the language of the paragraph, and is also contrary to the intent of Congress as indicated by legislative history.

In any event, the Association's argument would not validate the Embassy acquisition. For the asserted immunity would be limited to § 7; the acquisition, however, was also held to violate § 3 of the Sherman Act.

III

A trial court, having determined that an acquisition violates the antitrust laws, is obligated to order relief which will undo, to the extent reasonably possible, the wrong that has been done. In this case it is essential to effective relief that the judgment provide for a

divestiture of Embassy's business and assets
such terms that Embassy will come under new
ship as a viable business entity, able to surviv
to compete effectively with the well established
presently operating in the Washington market
Government submits that the district court,
gave only hasty and almost cursory considera
the question of relief, erred in failing (1) to requ
Association to divest not only the business and as
Embassy which it acquired on July 26, 195
"replacements therefor," but also the modern
chinery and other assets which the Associatio
used in the operation of Embassy since that
(2) to prohibit the Association from operatin
other dairy pending divestiture of Embassy an
a reasonable period thereafter; (3) to enjoi
Association, for a limited period after divest
from acquiring another dairy in the area, excep
the court's permission upon a showing by the As
tion that such acquisition would not substan
lessen competition or tend to create a monopoly
(4) to grant the Government visitation rigl
examine the Association's books and records.

ARGUMENT

I. SECTION 6 OF THE CLAYTON ACT AND THE CA VOLSTEAD ACT DO NOT IMMUNIZE THE ASSOCIA VIOLATION OF SECTION 2 OF THE SHERMAN AC CHARGED IN THE COMPLAINT, OR ITS VIOLATIO SECTION 3 OF THAT ACT AND SECTION 7 OF THE TON ACT, AS FOUND BY THE DISTRICT COURT

The district court, after holding that § 6 o
Clayton Act and the Capper-Volstead Act, sing
together, exempt an agricultural cooperative fro

prohibitions of § 2 of the Sherman Act, entered a judgment on November 10, 1958, dismissing the allegations of the complaint which charged the Associations with monopolizing and attempting to monopolize interstate commerce in violation of § 2. The Government's appeal from that judgment raises the issue of whether the foregoing statutory provisions give an agricultural cooperative untrammeled license to engage in the kind of monopolization and attempted monopolization of interstate commerce charged in the complaint. Unless the cooperative has such immunity, dismissal of the charge without affording the Government opportunity to establish its allegations was error. Furthermore, since the Government had filed a particularization of its monopolization charges, the full breadth of the charges, as particularized, must be within the asserted immunity if the judgment of dismissal is to stand.

The practical importance of the Government's § 2 charge is clear. As we shall show (see *infra*, pp. 29–32), the monopolization charge involves numerous coercive and predatory practices through which, it is alleged, the Association unlawfully obtained and maintained its monopoly power. If the Government is permitted to try its § 2 Sherman Act charge and if victorious on trial thereof, it will seek, and presumably will obtain, injunctive provisions against these predatory practices that would go far beyond the relief necessary and appropriate to cure the violations already found by the district court.

The Association, in appealing from the judgment of January 22, 1959, that it violated § 3 of the Sher-

man Act and § 7 of the Clayton Act, raises the question of whether, on the facts found by the district court, the conduct held to be violative of these sections is withdrawn from their prohibitions by § 6 of the Clayton Act and the Capper-Volstead Act. While, therefore, both appeals are concerned with the immunizing effect of these statutory provisions, the factual framework of reference as to § 2 of the Sherman Act is the particularized allegations of the complaint, but as to § 3 of that Act and § 7 of the Clayton Act is the district court's findings.

A. SECTION 6 OF THE CLAYTON ACT DOES NOT IMMUNIZE THE VIOLATION OF SECTION 2 OF THE SHERMAN ACT ALLEGED IN THE COMPLAINT, OR THE VIOLATION OF SECTION 3 OF THAT ACT AND SECTION 7 OF THE CLAYTON ACT FOUND BY THE DISTRICT COURT

Section 6 of the Clayton Act, unchanged since its enactment in 1914, provides that nothing contained in the antitrust laws shall be construed to forbid the "existence and operation" of labor or agricultural organizations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid individual members of such organizations from "lawfully carrying out the legitimate objects thereof"; nor shall such organizations or their members be held to be "illegal combinations or conspiracies in restraint of trade, under the antitrust laws." By the plain words of the section, the only immunity from the antitrust laws which it gives to labor unions and agricultural cooperatives is that these organizations shall not be deemed to be illegal combinations in restraint of trade. Both the House and Senate reports on the bill state that the purpose of the section was to forestall

the fear expressed by the president of the American Federation of Labor that the antitrust laws would or might be interpreted as meaning that such organizations are, by their very existence and essential objectives, illegal combinations in restraint of trade, subject to dissolution under these laws (H. Rep. 627, 63d Cong., 2d Sess., 14–16; S. Rep. 698, 63d Cong., 2d Sess., 10–12, 46).

Although § 20 of the Clayton Act provides that a wide range of labor union activity, such as strikes, boycotts and peaceful picketing, shall not, when incident to a labor dispute, "be considered or held to be violations of any law of the United States", this Court has consistently held that the Clayton Act does not manifest "a congressional purpose wholly to exempt labor unions" from the antitrust laws, and it was § 20 of the Act, rather than § 6, which was regarded as laying some foundation for a claim of total immunity. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 468–474; *United States* v. *Hutcheson*, 312 U.S. 219, 229–234; *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 803–805. Cf. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503–507, 512.

In the instant case the antitrust violations alleged in the complaint or found by the district court are not even remotely rested upon the view that the Association is in itself an illegal combination in restraint of trade. We submit, therefore, that the antitrust violations which are in issue are clearly not within any immunity given by § 6 of the Clayton Act.

B. THE CAPPER-VOLSTEAD ACT DOES NOT IMMUNIZE THE VIOLATION OF SECTION 2 OF THE SHERMAN ACT ALLEGED IN THE COMPLAINT

(1) The Capper-Volstead Act Does Not Confer on Agricultural Cooperatives Absolute, Blanket Immunity with Respect to Violation of Section 2 of the Sherman Act

Section 1 of the Capper-Volstead Act (*infra*, pp. 56–57) provides that producers of agricultural products may act together in corporate or non-corporate associations, operated for the mutual benefit of the member producers, "in collectively processing, preparing for market, handling, and marketing" their products in interstate and foreign commerce. The section also authorizes such associations to have marketing agencies in common and to "make the necessary contracts and agreements to effect such purposes".

Section 2 of the Act (*infra*, pp. 57–58) provides that if the Secretary of Agriculture believes that any such association "monopolizes or restrains" interstate trade "to such an extent that the price of any agricultural product is unduly enhanced by reason thereof", he shall serve upon the association a complaint stating his charge and, if he finds after a hearing that there has been such monopolization or restraint of trade, he shall issue an order directing the association to "cease and desist" therefrom. The section confers upon the several district courts jurisdiction to enter a decree enjoining violation of the Secretary's order, or a decree modifying or setting aside the order, and provides that the Department of Justice shall have charge of the enforcement proceeding.

United States v. *Borden Co.*, 308 U.S. 188, 206, held that since § 2 of the Capper-Volstead Act "does

not cover the entire field of the Sherman Act", and "contains no provisions giving immunity from the Sherman Act in the absence of a proceeding by the Secretary", the section does not confer upon the Secretary primary jurisdiction with respect to violation of the Sherman Act by agricultural cooperatives. The Court declared that "the procedure under § 2 of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to cooperative agricultural producers by § 1", and that the § 2 procedure was not intended to be "a substitute for the provisions of the Sherman Act." [10]

The unanimous decision in *Borden*, which this Court has never subsequently qualified, finds full support in legislative history. The statute as enacted is substantially in the terms reported by the House Judiciary Committee. The report of that Committee shows that the major purpose of Congress was to permit farmers to pool their product for marketing purposes, and to give associations utilized for this pooling the privileges and attributes of a single legal entity so that they could operate on a parity with the

[10] In *U.S. Alkali Assn.* v. *United States*, 325 U.S. 196, 209–210, this Court said that in *Borden* it had "rejected the contention that the Capper-Volstead Act gave to the Secretary 'exclusive jurisdiction' to determine in the first instance whether the acts of the cooperatives were violations of the Sherman Act because they went beyond the immunity granted by the Capper-Volstead Act"; and that it had there held that "neither the language nor the structure of the Capper-Volstead Act indicated a Congressional purpose to make the procedure by the Secretary, which it established, either a substitute for or a prerequisite to a suit by the United States under the Sherman Act."

ordinary stock corporation. The Committee's report states (H. Rep. 24, 67th Cong., 1st Sess., 2):

> Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for the purpose of collectively negotiating for a fair price, he is threatened with prosecution. Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members collectively do business as one person. The officers of the corporation act as agents of these members. This bill, if it becomes a law, will allow farmers to form like associations, the officers of which will act as agents for their members.

To the same effect, the report said (*ibid.*):

> While this bill confers on farmers certain privileges, it can not properly be said to be class legislation. Business corporations have under existing law all the powers and privileges sought to be conferred on farm organizations by this bill. Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it. * * *

The Committee believed that there "is no reason to fear monopoly from farm associations", but it said that if any such association "should monopolize or restrain trade so as to unduly enhance the price of any agricultural product ample provision is made in

the bill [by § 2] to protect the public" (*id.* 3). And the Committee stated, specifically and unequivocally, that it was not the intention to immunize agricultural cooperatives from the antitrust laws. It said (*ibid.*):

> In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them.

The Senate Judiciary Committee reported the House bill with an amendment which deleted § 2 of the bill and substituted the declaration: "Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly;" and the Committee interpreted the House bill as authorizing cooperatives to "establish a monopoly", in the sense that it would be permissible for all producers in a particular locality to become members of a cooperative and to market exclusively through it (S. Rep. 236, 67th Cong., 1st Sess., 1–2).[11] Although the Senate rejected the Committee's amendment (62 Cong. Rec. 2280–2281), such rejection means, at most, that Congress intended to permit this kind of "monopoly", and, in the face of the House Committee report (see *supra*, pp. 23–24), the rejection plainly does not show

[11] Section 1 of the Act authorizes agricultural producers to "act together" in associations in "collectively" marketing their product, and it does not limit the number or proportion of producers who may so act together.

Congressional intention to sanction monopolization of any other kind or form. In *April v. National Cranberry Association*, 168 F. Supp. 919, 922–923 (D. Mass.), the court so read the legislative history, and expressly disagreed with the holding by Judge Holtzoff in the instant case that, apart from conspiracy or combination with persons not agricultural producers, an agricultural cooperative is "entirely exempt" from the antitrust laws "as to all of its activities".

The teaching of the legislative history, therefore, is that agricultural cooperatives were given only a limited immunity from § 2 of the Sherman Act, namely, the right to obtain a "monopoly" in the colloquial sense of controlling the entire source of supply in a particular area. And this Court's decision in *Borden* is dispositive of the Association's contention (J. St. No. 62, p. 13) that, "absent participation in a combination or conspiracy, Section 2 of the Capper-Volstead Act was designed to provide the exclusive procedure by which antitrust remedies could be brought to bear upon cooperative activity adversely affecting competition." The Court in that case expressly rejected the trial court's conclusion that § 2 of the Capper-Volstead Act vests in the Secretary of Agriculture "an exclusive jurisdiction" with respect to agricultural cooperatives and that, "until the Secretary acts," prosecution under the Sherman Act is barred. 308 U.S. at 205. The Court held that § 2 simply makes provision for corrective administrative action when conduct permissible under § 1 results in undue enhancement of price. It said that the procedure under § 2 "was intended merely as a *qualification of the authorization given* to cooperative agricultural producers

by § 1, so that if the collective action of such producers, *as there permitted,* results in the opinion of the Secretary [of Agriculture] in monopolization or unduly enhanced prices, he may intervene and seek to control *the action thus taken under § 1"* (emphasis supplied). *Id.* 206.

The opinion in *Borden* does not suggest that § 1 of the Capper-Volstead Act confers a blanket immunity aside from the single circumstance that the cooperative conspires with outsiders, *i.e.,* those who are neither agricultural producers nor associations thereof. The question here pertinent which was before the Court in *Borden* was whether the indictment stated a cause of action under § 1 of the Sherman Act as against an agricultural cooperative, in view of possible immunity therefrom given by the Capper-Volstead Act. The indictment charged that an agricultural cooperative, major distributors of milk and their allied groups, labor officials, municipal officials, and others, had conspired to fix non-competitive prices to be paid to "all" producers by "all" distributors for "all" fluid milk produced in four midwestern states and shipped to Chicago; to fix non-competitive prices for the sale by "the distributors" in Chicago of fluid milk shipped into the city from the states in question; and to limit, control, and obstruct the supply of fluid milk moving into the city from these states. 308 U.S. at 191, 194.

This Court, dealing with the application of the Capper-Volstead Act to the facts of the case, held that the right of agricultural producers, given by § 1, to unite in marketing their products and to make the

contracts necessary for that collaboration, "cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise" (308 U.S. at 204–205); that such a "combined attempt * * * to control the market finds no justification in § 1" (*id.* 205); and that "§ 1 cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment" (*id.* 206). The Court thus rested its conclusion, not on the precise terminology of § 1, but on the more basic ground that the conduct charged could not reasonably be regarded as within ends which the Capper-Volstead Act intended to legitimate.

We submit that it is inconsistent with the Court's reasoning to view agreement with an outsider—and "conspiracy" is simply an agreement which is illegal—as the sole circumstance under which a cooperative transcends the authority conferred by § 1 of the Capper-Volstead Act. However, in any event, the issue in *Borden* was not loss, by reason of agreement with outsiders, of an immunity given by the Act, but whether the conduct charged came within any immunity. The illegality found by the court was not agreement or "conspiracy" with outsiders, but engaging in conduct which was not essential to a cooperative's purposes and which, as to an ordinary business corporation, is clearly banned by the Sherman Act. The essential holding was that the Capper-Volstead Act does not authorize the kind of trade-restraining and monopolistic agreement with outsiders charged in the indictment.

Here, as in *Borden*, the problem is to accommodate two Congressional policies embodied in different statutes, the one seeking to preserve a competitive business economy and the other to obtain better returns for farmers through the medium of collective marketing.[12] Cf. *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 806. The problem is to determine "how far Congress intended activities under one of these policies to neutralize the results envisioned by the other". And this determination is to be made with due regard for the rule that any exemptions from the antitrust laws to be implied from provisions of the Capper-Volstead Act are "special exceptions to a general legislative plan", that is, the basic Sherman Act provisions which have governed interstate trade since 1890. See *id.* 809.

In the light of the foregoing discussion of the Capper-Volstead Act, its legislative history, and the *Borden* decision, we turn to the question, discussed below, whether the Association's monopolization and attempted monopolization of a part of interstate commerce, as charged in the complaint, goes beyond any supply-control position implicitly authorized by the Capper-Volstead Act.

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[12] On May 26, 1959, the Secretary of Agriculture, acting pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601, *et seq.*), issued a milk marketing order for the Washington area (24 F.R. 4331–4338). This order, which is still in effect, fixes minimum prices to be paid by each "handler" (operator of a milk processing plant) for milk received from any producer or Capper-Volstead cooperative and marketed in the defined Washington, D.C., marketing area (*id.* 4331–4332, 4335).

(2) The Capper-Volstead Act Does Not Authorize, and Therefore Does Not Immunize from the Antitrust Laws, the Monopolization and Attempted Monopolization Charged in the Complaint

The complaint charged that the Association had done certain things in effectuating monopolization and attempted monopolization of the milk supply in the Washington metropolitan area (R. 17). Among the acts of effectuation so charged were:

> b. Excluded, eliminated, and attempted to eliminate others, including producers and producers' agricultural cooperative associations not affiliated with defendant, from supplying milk to dealers [*ibid.*].

As the above is particularized (R. 35–36, 38), the Association, among other things, attempted to arrange in the period 1940–1942 that producers supplying Embassy (who were not Association members) "switch" to the Baltimore market; attempted to prevent transportation by truck of milk of non-member producers; attempted to exclude a cooperative association of milk producers as a supplier of milk in the Washington area; acquired the assets of Embassy and arranged that the producers supplying it be diverted from the Washington market or absorbed into the Association; purchased a dealer (Richfield Dairy) in order to preclude it from being an outlet for milk supplied by others (R. 39–40, 72).

> e. Threatened and under[took] diverse actions to induce or compel dealers to purchase milk from the defendant, and induced and assisted others to acquire dealer outlets purchasing milk from producers not affiliated with the defendant [R. 18].

The particularization of this charge includes: use of a dealer's indebtedness to the Association in order

to obligate him to purchase the Association's milk; sale to a dealer on a price basis contravening the Association's established price basis in order to stop the dealer's purchases from non-member producers; refusing to sell to a dealer unless an affiliated dealer purchased from the Association; use of a boycott by Association members to compel a dealer to purchase from the Association (R. 41–42).

g. Threatened and engaged in predatory pricing [R. 18].

The particularization of the above charge includes: sale of milk to dealer-customers at reduced prices in order to "break" Embassy; threatening to sell to dealer-customers below prevailing prices to take business from Embassy unless it purchased from the Association; sale of milk below prevailing prices to "cooperating" dealer-customers to take business away from independent dealers; threatening to reduce prices to dealer-customers for resale under Government contracts in order to prevent an independent dealer from successfully competing for such contracts (R. 43–44).

k. Eliminated and attempted to eliminate competition with its dealer-customers by dealers purchasing milk from others than the defendant [R. 18].

The particularization of the charge includes: refusing to sell to a dealer (High's Dairy) on the ground that it sold milk at retail prices below those charged by the Association's dealer-customers; sale of milk below prevailing prices to "cooperating" dealer-customers for use in taking business from "non-cooperating" dealers; attempting to induce a dealer to raise its retail prices; obtaining in 1954 covenants

and agreements not to sell milk in the Washington metropolitan area (R. 57).

We submit that in at least two respects the monopolization charges are beyond the ambit of any Capper-Volstead Act authorization. The first respect involves the allegations respecting exclusion or attempted exclusion from the market of non-member producers. The Capper-Volstead Act permits producers to market collectively for their "mutual benefit" through a membership association, but does not thereby sanction use by the association of any dominant market position which it obtains by reason of having been selected by most of the local producers as their sales agent, to cut off the normal market outlet of non-member producers, and confront them with the choice of being shut out of this outlet or becoming members of the association. No word or provision of the Capper-Volstead Act suggests that an agricultural cooperative, once organized, is empowered to coerce producers to become members or to market through it.[13] Accordingly, when, as here, a cooperative uses a position of market dominance[14] to exercise such coercion,

[13] Indeed, in the debate on the bill the producers' freedom of choice was emphasized. Senator Kellogg, the floor leader of the bill, said that those who chose not to join an agricultural association "ought to be allowed to stay out and to sell their products individually or collectively or in any way they please" (62 Cong. Rec. 2267). Senator Walsh, chairman of the Committee which reported the bill, said that formation of an association would not bar formation of others, that if "farmers desire to organize into 20 different associations, they will have a perfect right to do so" (*ibid.*).

[14] The Association unquestionably had a dominant market position. In passing upon the validity of the complaint's monopolization charges, the allegations of the complaint are controlling, and the complaint alleged that during 1955 the Asso-

the Capper-Volstead Act does not shelter it against the prohibitions of the Sherman Act.

The second major respect in which the Association's conduct exceeded any authorization implicit in § 1 of the Capper-Volstead Act involves various coercive acts—boycotting, refusals to sell, predatory price cutting, credit leverage—in order to injure or destroy the business of dealers who did not purchase, or did not purchase exclusively, from the Association.

Existence of power "to exclude competition when it is desired to do so", when coupled with purpose or intent to exercise this power, is itself a violation of § 2 of the Sherman Act. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809, 811, 814. It is "unreasonable, *per se,* to foreclose competitors from any substantial market". *International Salt Co.* v. *United States,* 332 U.S. 392, 396. And "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *United States* v. *Griffith,* 334 U.S. 100, 107.

We assume that the Capper-Volstead Act permits an agricultural association to obtain a degree of control over supply which, in the case of an ordinary corporation, might constitute unlawful monopolization—provided such control results solely from the volun-

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ciation supplied 92% of the milk sold to Washington metropolitan area dealers (R. 14). We also note that the district court found that, prior to the Embassy acquisition, the Association supplied 86% of such milk (R. 486).

tary act of local producers in becoming members of the association. But the Act clearly does not authorize use of this monopoly position "to beget monopoly" in the retail market in which its purchasers resell, or to expand its own "empire" by coercive or exclusionary means. Cf. *Griffith, supra,* 334 U.S. at 108.

In the present case the Association, controlling some 90% of the milk supply, engaged in predatory and coercive practices to expand its dominant position and to exercise a large degree of control over the retail market in which the purchasers from it resell. Furthermore, when the Association reduced its price to "cooperating" dealers, in order that they in turn reduce their resale price in particular transactions or types of transaction, for the purpose of taking business away from "non-cooperating" dealers, the Association and the cooperating dealers were, in effect, jointly establishing the level of resale prices. It has long been recognized that a seller of goods may not lawfully set resale prices by agreement express or implied. *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U.S. 373, 404; *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U.S. 441, 452–453; *United States* v. *Bausch & Lomb,* 321 U.S. 707.

The decided cases fully support our view that any immunity from the antitrust laws given by Capper-Volstead does not embrace monopolization achieved by means involving restraints of trade of a kind ordinarily cognizable under § 1 of the Sherman Act. In *April* v. *National Cranberry Association,* 168 F. Supp. 919, 923 (D. Mass.), the court (Judge Aldrich) said:

> Particularly I can think of no purpose to be served by permitting cooperatives to use unfair methods to put competitors out of business. To permit this would award agricultural cooperatives a very substantial "privilege or special favor," contrary to the bill's announced purpose and the disclaimers of its sponsors. In the absence of specific language in the act to the contrary, I hold that * * * at least it [Capper-Volstead Act] did not make lawful purely predatory practices seeking to monopolize * * *.

In *Cape Cod Food Products* v. *National Cranberry Association,* 119 F. Supp. 900, 907 (D. Mass.), the court (Judge Wyzanski) in its charge to the jury said that a Capper-Volstead cooperative does not violate the antitrust laws when it acquires even a 100% position in the market if this is achieved solely through "cooperative purchasing and cooperative selling", but that seeking to secure a dominant share of the market "through a restraint of trade which was prohibited, or through a predatory practice, or through the bad faith use of otherwise legitimate devices" would be a prohibited monopolization.

In *Gulf Coast Shrimpers & Oystermans Ass'n* v. *United States,* 236 F. 2d 658, 665 (C.A. 5); certiorari denied, 352 U.S. 927, the court held that a fishermen's association exceeded any privilege or exemption granted by the Fishermen's Collective Marketing Act [15] when it undertook "not simply to fix the prices demanded by its members, but to exclude from the mar-

[15] The pertinent provisions of the Act (15 U.S.C. 521) are identical with those of § 1 of the Capper-Volstead Act.

ket all persons not buying and selling in accordance with its fixed prices." [16]

C. THE CAPPER-VOLSTEAD ACT DOES NOT IMMUNIZE THE VIOLATION OF SECTION 3 OF THE SHERMAN ACT OR THE VIOLATION OF SECTION 7 OF THE CLAYTON ACT FOUND BY THE DISTRICT COURT

(1) The Sherman Act Section 3 Violation

We recognize that the Capper-Volstead Act, by authorizing agricultural associations to engage in collective "processing" and "marketing", and to have "marketing agencies", does not limit the authority conferred to initial sale of agricultural products, but includes, for example, the processing and marketing functions performed by a milk dealer, who processes and acts in part as a middleman and in part as a retailer selling to ultimate consumers. We also assume that an association does not necessarily exceed the statutory authorization if, instead of gradually building up its own dealer organization, it acquires the assets and business of an existing dealer.

The Embassy acquisition was thus not beyond the purview of the Capper-Volstead Act merely because it was the acquisition of a milk dealer. However, we do contend that it was beyond such purview because of the purposes and effect of the particular acquisition. The district court found as a fact that it "was entered into with the intent and purpose of restraining trade" (R. 505), and it found as a fact that "the result of the [acquisition] was a foreclosure of competition, in respect to Government contracts and in re-

[16] *United States* v. *Dairy Co-op Ass'n*, 49 F. Supp. 475 (D. Ore.), is not a contrary authority since the decision was not rested on the Capper-Volstead Act but solely on § 6 of the Clayton Act.

spect to purchases of milk from milk producers" (R. 504–505). Indeed, the evidence makes it abundantly clear that the Embassy acquisition was motivated by considerations other than a desire on the part of the Association that it secure for its members the profits incident to conducting the business of a dealer. The Association was willing and eager to pay more than $1,000,000 above the value of the assets acquired (*supra*, p. 8), and without regard for the actual earnings of the business.[17]

The purposes of the acquisition avowedly were wholly anticompetitive and monopolistic—to decrease the supply of milk in the local market, to increase the proportion thereof controlled by the Association, to increase the Association's membership (by what amounted to coercion), to eliminate a price cutter and thereby stabilize retail prices, and to eliminate or decrease price competition in bidding for Government contracts (*supra*, pp. 9–10). The Association's secretary-treasurer, in writing to the secretary-manager of the Michigan Milk Producers' Association more than six months after the Embassy acquisition, stated that the Association felt compelled to buy Embassy "for self protection"; that Embassy's ac-

[17] Embassy's 1952–1954 net income (before taxes) averaged under $80,000 (R. 627). To acquire the business, the Association paid nearly $4,000,000 (*supra*, p. 7), and a 5% return on $4,000,000 is $200,000. Moreover, the Embassy business had been conducted upon the basis of buying milk at "cheap" prices, which the Association intended to stop. In fact, the Embassy business, following acquisition by the Association, has resulted in substantial operating losses—about $388,000 for the last five months of 1954, about $562,000 for 1955, and about $412,000 for 1956 (R. 628).

tivities in the Washington market had been such that "everyone in the distributing field would be happy to have them out of the market"; that the acquisition gave the Association an additional outlet for a sizable amount of milk and "has improved market conditions"; that he has "never been entirely sold on the idea of producer organizations getting into the distributing end of the business", and would "strongly recommend" that this be done only where an outlet for a sizable amount of milk would be obtained by eliminating an "independent buyer" (R. 625–626).

If the Capper-Volstead Act immunizes the Embassy acquisition—where an agricultural association enters upon a field of distribution new to it, not as an opportunity to earn profits as a distributor, but to remove from the market rival agricultural producers and to eliminate a competitor troublesome to its customers—the Act gives to such an association a privilege to violate the antitrust laws denied to ordinary trading corporations, and gives a privilege which is not necessary to effectuate the collective marketing authorized by the Act. Since Congress denied that it intended to give Capper-Volstead associations such a privileged status (*supra*, pp. 23–25), the Association's immunity claim must be rejected.

The Association's appeal attacks the district court's holding—that the Embassy acquisition violated § 3 of the Sherman Act—solely upon the ground of error in rejection of the Association's immunity claim, and the appeal raises no question of error in this holding aside from rejection of the immunity claim (R. 90–

91). Nevertheless, we point out that a contract, combination or conspiracy to acquire the business of another is illegal under § 1 of the Sherman Act (which is the parallel of § 3) if the effect of the acquisition is "to unreasonably restrict the opportunities of competitors to market their product", and "even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman Act". *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 524, 525. In *Times-Picayune* v. *United States*, 345 U.S. 594, 614, the Court reiterated that contracts and agreements are within the prohibitions of Sherman Act § 1 "if unreasonable restraint was either their object or effect".

(2) *The Clayton Act Section 7 Violation*

The Capper-Volstead Act does not explicitly authorize an agricultural association to acquire a company engaged in one or more steps in distribution, *i.e.*, a company doing business as a jobber, wholesaler, and/or retailer. Assuming *arguendo* that there may be circumstances in which the Capper-Volstead Act implicitly sanctions such an acquisition, as being "necessary" to effectuate the collective-marketing purposes of a Capper-Volstead association,[18] in the case of the Embassy acquisition the district court's findings and the evidence negative any valid relationship

[18] These circumstances might be a purpose to perform the function of distribution more efficiently than existing distributors or a purpose to share in the normal profits of the business of distribution.

between the acquisition and furtherance of the collective marketing authorized by the Act (*supra*, pp. 8–11). They show, instead, an acquisition designed to exclude competitors from the market—in short, "deliberate, calculated purchase for control." [19]

To repeat certain salient facts, the Association, already having about 86% of the market, acquired Embassy, which had about 9.5% of the market and which obtained its milk from non-members of the Association, so-called "independent" producers (R. 486–487). An avowed objective of the acquisition was to eliminate Embassy as a market outlet for the Association's competitors, the non-member producers selling milk to Embassy (*supra*, pp. 9–10), and the acquisition's necessary consequence was to foreclose some 95% of the market to competitors. This market foreclosure cannot, we submit, be deemed "necessary" for effectuating the voluntary, not coerced, collective marketing authorized by the Capper-Volstead Act (*supra*, pp. 31–32, 34).

As indicated above, the Embassy acquisition is not within any immunity given by the Capper-Volstead Act. Absent such immunity, the Embassy acquisition, if subject to § 7 of the Clayton Act, clearly violates the section, which makes it unlawful for a corporation engaged in interstate commerce to acquire the assets of another corporation so engaged "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[19] See *United States* v. *Reading Co.*, 253 U.S. 26, 57; *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227.

II. THE PROVISION OF SECTION 7 OF THE CLAYTON ACT THAT ITS PROHIBITIONS ARE NOT APPLICABLE TO TRANSACTIONS CONSUMMATED PURSUANT TO AUTHORITY GIVEN BY THE SECRETARY OF AGRICULTURE DOES NOT VALIDATE THE EMBASSY ACQUISITION

The Association contends that the Embassy acquisition comes within the last paragraph of § 7 of the Clayton Act and is therefore exempted from the section. The last paragraph was added by the Act of December 29, 1950, which materially amended § 7 in other respects. The paragraph provides:

> Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Acceptance of this contention, however, would not validate the acquisition. For the district court held that the acquisition violated not only Section 7 of the Clayton Act, but also Section 3 of the Sherman Act, and except for its exemption claim, the Association does not challenge the latter ruling (R. 90–91). By its terms, however, the last paragraph of Section 7 only confers immunity from the prohibitions of "this section," *i.e.*, Section 7 of the Clayton Act, and gives no Sherman Act immunity.

In any event, we submit that the district court correctly rejected the contention that the last paragraph of Section 7 confers Clayton Act immunity upon the Embassy acquisition. The district court so ruled on two grounds, either of which is decisive: (1) there is no statutory provision giving the Secretary of Agriculture power to approve the acquisition of the assets of another corporation by a Capper-Volstead association; and (2) this transaction had not been authorized by the Secretary or anyone acting in his behalf (R. 494).

The Association's jurisdictional statement concedes (p. 16) that "no statute, to our knowledge, gives the Secretary of Agriculture specific authority to approve any acquisition at all", that is, that he is without statutory authority to approve any transaction which is within the prohibition of § 7, whether the acquiring corporation is or is not a Capper-Volstead association. This amounts to a concession that the last paragraph of § 7 is inapplicable to the Embassy acquisition.

As we understand, the Association also does not question the correctness of the other branch of the district court's ruling—its finding that the Secretary had never authorized, or purported to authorize, the Embassy acquisition. It appears to stand unchallenged that the Secretary did not go through the motions of doing an act not within any power vested in him by statute.

The Association appears to contend (Juris. St. 16–18) that § 7's last paragraph, read in conjunction with the phrase in the first paragraph that no corporation "subject to the jurisdiction of the Federal Trade Com-

mission" shall acquire the assets of another corporation, indicates an intent by Congress to exclude acquisitions by Capper-Volstead associations from the prohibitions of § 7. But the phrase "subject to the jurisdiction of the Federal Trade Commission" points to the opposite conclusion. The provisions for administrative enforcement of § 7 are found in § 11 of the Act, 15 U.S.C. 21. Section 11, as likewise amended by the Act of December 29, 1950, confers upon the Federal Trade Commission jurisdiction to enforce compliance with § 7 with respect to all corporations engaged in interstate commerce other than certain carriers and financial institutions.[20] Since a Capper-Volstead association is not within these exceptions, it is, under § 7, "subject to the jurisdiction of the Federal Trade Commission".

Possibly the Association will contend that, in view of the Secretary's lack of statutory authority to pass upon an acquisition of corporate assets by an agricultural cooperative, the reference to the Secretary in the last paragraph of § 7 is without meaning unless

[20] Section 11 as thus amended provides (64 Stat. 1126):

"Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce * * *."

the paragraph is interpreted as providing for a blanket exclusion of such cooperatives from the section. But the paragraph provides for exclusion only where there is both statutory power vested in the Secretary to authorize a transaction and actual administrative exercise of this power—"transactions duly consummated pursuant to authority given by the * * * Secretary". Both of these necessary elements would have to be ignored if the paragraph were to be construed as in and of itself excluding all agricultural cooperatives from § 7.

Pertinent legislative history, while sparse, is likewise contrary to the view that Congress intended to exclude all agricultural cooperatives from § 7. In the first place, the last paragraph of § 7 was deemed a very minor and unimportant aspect of the proposed amendment of §§ 7 and 11. The House and Senate reports on the bill make only casual reference to § 7's last paragraph. H. Rep. 1191, 81st Cong., 1st Sess., 6; S. Rep. 1775, 81st Cong., 2d Sess., 7. The reference to the Secretary may have resulted from views expressed in certain testimony given in hearings in the 80th Congress on H.R. 515.[21] The secretary of the National Cooperative Milk Producers Federation expressed the opinion that the proposed legislation might be interpreted as nullifying rights accruing to agricultural cooperatives under the Capper-Volstead Act, and requested that the following be added to the last

[21] This bill basically corresponded with the bill enacted in the 81st Congress, and § 7's last paragraph had the same provisions as the paragraph as later enacted, but it made no reference to the Secretary of Agriculture.

paragraph of § 7: "This Act shall not apply to farmer owned and controlled cooperative associations operating within the provisions of section 1 of the Act of February 18, 1922 [the Capper-Volstead Act]". Hearings Before Subcommittee No. 2 of the House Judiciary Committee on H.R. 515. 80th Cong., 1st Sess., Serial No. 3, 103–104.

Significantly, Congress did not adopt the language suggested by this witness, which would have taken agricultural cooperatives out of § 7, but simply included the Secretary of Agriculture among the agencies whose administrative action, pursuant to statutory authority, might exclude a transaction from § 7. Furthermore, the report of the House Judiciary Committee said with reference to the jurisdiction of these agencies that "there is no disposition to change the present arrangement regarding them". H. Rep. 1191, 81st Cong., 1st Sess., 6. The report of the Senate Judiciary Committee stated even more pointedly and directly (S. Rep. 1175, 81st Cong., 2d Sess., 7):

> The Maritime Commission, at its request has been included in the category of agencies to which the act does not apply when transactions are duly consummated pursuant to authority given to that Commission. In making this addition, however, *it is not intended that the Maritime Commission, or, for that matter, any other agency included in this category, shall be granted any authority or powers which it does not already possess.* [Emphasis supplied.]

While the Congressional purpose in including the Secretary of Agriculture in the last paragraph of

§ 7 is thus not clear, there is no indication that Congress thereby intended to broaden the existing antitrust immunity of agricultural cooperatives under Capper-Volstead. Indeed, the Secretary may have been included merely to cover the possibility that the many statutes which he administers might have authorized him to approve some corporate acquisitions.

III. THE DISTRICT COURT'S JUDGMENT FAILS TO GRANT ADEQUATE RELIEF

In civil antitrust cases brought by the United States, this Court has repeatedly emphasized the critical importance of adequate relief. Upon this may depend whether "the Government has won a lawsuit and lost a cause." *International Salt Co.* v. *United States,* 332 U.S. 392, 401. And the purpose of a decree in a case of this type is to "effectively pry open to competition a market that has been closed by defendants' illegal restraints" (*ibid.*). Since the Government's civil antitrust cases are brought to this Court on direct appeal from the district court, without passing through the courts of appeals, the relief granted "has always had the most careful scrutiny of this Court." *International Boxing Club* v. *United States,* 358 U.S. 242, 253. While it is "peculiarly the responsibility of the trial court" to determine what decree provisions are sufficient to cure the ill effects of an antitrust defendant's illegal conduct, this Court has never treated the trial court's exercise of the power thus vested in it "as one of discretion, subject only to reversal for gross abuse". *United States* v. *U.S. Gypsum Co.,* 340 U.S. 76, 89. Rather the Court

has "felt an obligation to intervene in this most significant phase of the case" when it concludes that the provisions of the decree below are inappropriate or inadequate (*ibid.*).

Furthermore, the relatively cursory consideration given by the court below to the question of relief emphasizes the need in this case for careful appellate scrutiny and review. There was no separate hearing for the taking of evidence on relief. The two opinions holding the Embassy acquisition illegal directed counsel to submit proposed judgments (R. 496, 506), and the opposing parties did submit widely differing proposed judgments,[22] which the court considered at a hurried hearing.[23] Early in the hearing it said that it would adopt the Association's draft judgment as the basis for its decree,[24] and the judgment which it signed at the end of the hearing was this draft, with the interlineations and excisions made by the court during the course of the hearing (R. 539).

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[22] See Government's proposed judgment (R. 76–84). The Association's proposed judgment is not, as such, included in the printed record. The court's final judgment of January 22, 1959 (R. 85–87) represents the Association's proposed judgment, the italicized words being those added by the court and the words through which a line is drawn being those which it struck.

[23] At the hearing the court said (R. 527): "Gentlemen, we are spending an awful lot of time on this. I have a jury case on trial, and I interrupted it for this. Let's move along a little more expeditiously."

[24] The court said (R. 519): "Now, gentlemen, it seems to me that I ought to use the Defendant's draft as a basis for my decree. I rather like the form of the Defendant's draft anyway."

We set forth below the several respects in which the judgment, in our opinion, fails to provide sufficient safeguards to insure a divestiture which will result in establishment of an effectively competing independent dairy.

(1) *Assets to be divested.* In order to restore the Washington market to a state of effective competition, to "undo as near as may be the wrongs that were done" (*United States* v. *Griffith,* 334 U.S. 100, 109), Embassy must be divested from the Association as a viable business entity. The Government's victory in the court below will prove an empty one if Embassy is cast loose only to perish, or if no buyer for it can be found. In that event, the Association would retain the fruits of its unlawful conduct and independent farmers would continue to be foreclosed from the market.

The judgment requires the Association, within a year, to "dispose of as a unit and as a going dairy business all [Embassy] assets * * * tangible or intangible, which it acquired on July 26, 1954, and replacements therefor", and requires it, pending divestiture, to administer these assets in "good faith" so as to preserve them in "as good condition as possible" (R. 85–86).

The judgment should be modified so as to require the Association to divest all assets used, as of the date of disposition, in the dairy business conducted under the trade name "Embassy Dairy". The assets presently so used include those acquired from Embassy in 1954, new equipment purchased by the Association, assets which it acquired in 1957 from the Richfield-

Wakefield Dairy, and assets represented by the interim increase in Embassy's volume of business. Divestiture of Embassy in its present operating status is essential, not only to increase the likelihood of finding a purchaser, but also to make it possible for the new Embassy to develop into a significant independent competitive business. However, the court indicated that under its judgment the Richfield-Wakefield assets acquired by the Association and presently used in its Embassy business need not be disposed of unless they constitute "replacements" for assets acquired from Embassy (R. 521–522, 533–534), and it declined to rule whether the judgment would require divestiture of new equipment purchased by the Association and used in conducting its Embassy dealer business (R. 536–537).[25]

If the modern machinery and other assets added by the Association are not within the divestiture order, it is doubtful whether the Embassy assets could be reorganized into a company that would survive, much less compete effectively with the other well-established dairies. This is particularly critical because dairy technology and the population of metropolitan Washington have not remained static in the five-year period since the acquisition.[26] Nor would the Association be

[25] Compare this Court's statement in *International Salt Co.* v. *United States*, 332 U.S. 392, 400, that "it is desirable, in the interests of the court and of both litigants, that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur."

[26] Total fluid milk sold by Washington metropolitan area dealers increased from 567 million pounds in 1953 (R. 667) to 685 million pounds in 1957 (R. 675). During this period, Em-

adversely affected by the requirement that *all* assets currently used in the Embassy business be included in the sale of that business. Presumably the price received by the Association on the sale of Embassy would reflect the value of the assets purchased by the Association or acquired from Richfield-Wakefield and incorporated in the Embassy business.

(2) *Safeguard against inroads on Embassy's business.* The current volume of Embassy's business would be a material factor in its value to a purchaser and in the viability of Embassy following purchase. Indeed, the district court was of the opinion that operation by the Association of another dairy pending divestiture of Embassy would "impair Embassy", but declined to frame its judgment so as to guard against such impairment (R. 510). Likewise, the marketability of Embassy's assets and its ability to survive would be adversely affected if, immediately following divestiture, the Association were free to operate a dairy and recapture its Embassy customers. The judgment which the Government proposed would have banned the Association from engaging in the wholesale or retail distribution of fluid milk in the Washington area pending divestiture of Embassy and for a specified period following divestiture (R. 79). We submit that safeguards of this character clearly are required, and it might appropriately be left to the district court to determine the period of any post-divestiture ban against operating as a dealer in the Washington market.

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bassy's total annual business increased from 50 million pounds to 60 million pounds (*ibid.*).

(3) *Future acquisitions.* The Government's proposed judgment provided for enjoining the Association, for a specified period after entry of judgment, from acquiring any business consisting of sale or distribution of milk in the Washington market without (a) prior notice to the United States and, if it objected, (b) approval of the acquisition by the court upon a showing that it would not substantially lessen competition or tend to create a monopoly in the sale or distribution of fluid milk in that market (R. 82). The district court gave no explanation for its rejection of this provision, except for the general statement that "all" it "intended to do by way of relief was to order divestiture of the assets of Embassy Dairy * * * and a cancellation of the auxiliary contracts" (R. 507).

Since the Association already controlled about 86% of the milk supply in that market, any additional engrossing of that market by the Association necessarily would pose a serious anti-competitive threat. The record in this case demonstrates the difficulty of undoing a consummated acquisition in the dairy business. The district court found that the Embassy acquisition was made with the specific intent to eliminate competition. The development of Embassy as a strong independent competitive factor in the market might be seriously inhibited if the Association could quickly reenter that market by purchasing another dairy. Indeed, that possibility might deter prospective purchasers from Embassy. Finally, it must be borne in mind that the district court held that the

acquisition violated not only § 7 of the Clayton Act but also § 3 of the Sherman Act.

In these circumstances, we submit that it was appropriate to require, for a limited period after divestment,[27] that the Association should establish that adverse competitive effects would not flow from its acquisition of another dairy. Such a provision, of course, would not operate as a bar to any future acquisitions by the Association. It would merely, in a situation where adverse competitive effects are likely to result from any acquisition, shift to the Association the burden of proving the absence of competitive injury from a particular transaction, rather than requiring the Government to prove such injury in the first instance.

This type of antitrust relief has been held to be appropriate and necessary in other cases. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185–187; *Schine Theatres* v. *United States*, 334 U.S. 110, 130. We believe that it was equally appropriate and necessary in this case.

(4) *Visitation rights.* The district court's refusal to grant the Government visitation rights, as embodied in its proposed judgment (R. 83), is a particularly serious handicap in the present case since certain im-

[27] The Government's proposed judgment (R. 82) suggested a twenty-year period. Upon further consideration, we have concluded that a shorter period would probably be adequate to insure the development of Embassy as a strong independent competitive factor in the market. While the length of such period is a matter initially for the determination of the district court, we suggest that five years might perhaps be appropriate.

portant judgment provisions (pars. 5 and 6, R. 86) depend for their effectiveness upon the Association's compliance with a vague "good faith" standard. Without visitation rights, it will be extremely difficult for the Government to determine the Association's compliance with this and other aspects of the judgment. The mere filing of reports by the Association (R. 86, 522–523), and the Government's right to "make an application" to the district court for "examining books and papers" "[i]f there is any reason" therefor (R. 517), are not adequate substitutes for a visitation provision.

Whatever might be the justification for a denial of visitation rights in the exercise of the court's discretion as to the relief appropriate in the circumstances of the particular case, this was not the basis of denial here. The basis of denial here was that visitation rights are comparable to an unlawful search and seizure (R. 517). This, we submit, was error. In *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 726–728, this Court upheld visitation rights of the kind proposed in the instant case, and considered and expressly rejected (p. 727) objections grounded on the Fourth Amendment's unreasonable search and seizure provisions. See also *United States* v. *National Lead Co.*, 332 U.S. 319, fn. 4, at pp. 333–334.

CONCLUSION

The judgment of November 10, 1958, dismissing the cause of action based upon § 2 of the Sherman Act, should be reversed. The judgment of January 22, 1959, should be affirmed as to the adjudication that

the Association violated § 3 of the Sherman Act and § 7 of the Clayton Act but should otherwise be reversed. The cause should be remanded to the district court for further proceedings in conformity with the opinion of this Court.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
ROBERT A. BICKS,
Acting Assistant Attorney General.
CHARLES H. WESTON,
IRWIN A. SEIBEL,
JOSEPH J. SAUNDERS,
RICHARD H. STERN,
Attorneys.

NOVEMBER 1959.

APPENDIX

The Act of July 2, 1890, 26 Stat. 209, as amended, known as the Sherman Act, provides in part as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *. [15 U.S.C. 1.]

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *. [15 U.S.C. 2.]

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. * * * [15 U.S.C. 3.]

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the

Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *. [15 U.S.C. 4.]

The Act of October 15, 1914, 38 Stat. 730, as amended, known as the Clayton Act, provides in part as follows:

SEC. 6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. [15 U.S.C. 17.]

SEC. 7. No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

* * * * *

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime

Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board. [15 U.S.C. 18.]

* * * * * *

SEC. 15. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U.S.C. 25.]

The Act of February 18, 1922, 42 Stat. 388, known as the Capper-Volstead Act, provides:

SEC. 1. Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes; *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members. [7 U.S.C. 291.]

SEC. 2. If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition ask-

ing that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to the pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. * * * [7 U.S.C. 292.]

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Nos. 62 and 73

In the Supreme Court of the United States

OCTOBER TERM, 1959

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, APPELLANT

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, APPELLANT

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
ROBERT A. BICKS,
Acting Assistant Attorney General,
CHARLES H. WESTON,
IRWIN A. SEIBEL,
JOSEPH J. SAUNDERS,
RICHARD H. STERN,
Attorneys,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

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No. 62

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---

1. Throughout its brief the Association emphasizes that the Capper-Volstead Act looks to the achievement by agricultural cooperatives of market-wide domination and power and that this statutory objective is the antithesis of that of the Sherman Act. It contends (Br. 23) that application of the "conventional standards [of the Sherman Act] to farmer coopera-

tives would plainly subject them to criminal antitrust prosecutions for achieving or seeking the very market power which Capper-Volstead authorizes them to have and federal agencies have actively encouraged them to acquire." It accordingly concludes (Br. 72) that, as to these cooperatives, Capper-Volstead "immunized monopolization or restraint of trade unless prices were unduly enhanced."[1]

The primary issue in this case is, however, much narrower and more precise than that stated by the Association. The Government has not asserted that a cooperative, by the mere possession of monopoly market power, transcends any Capper-Volstead authorization. It does not assert the invalidity of market power achieved by voluntary enlistment of the area farmers in a program of collective marketing through the medium of a Capper-Volstead association. Its contention is that the Act itself defines what it authorizes—collective marketing through membership associations and such agreements and contracts as are "necessary" to attain this end. It further contends that the statutory authorization does not extend to cutting off access to the market by competing cooperatives or non-member producers, or to denying such access by boycotting, coercing or discriminating against those who deal with non-member producers. While we recognize that Capper-Volstead authorizes vertical integration through acquisition by a cooperative of a dealer for the purpose of marketing the prod-

[1] Save in the single circumstance where such cooperatives conspire or combine with non-agricultural producers, which this Court held to be non-exempt in the *Borden* case.

uce of its members direct to retailers, the Government maintains that the authorization does not embrace vertical integration having as its purpose, as found by the district court, exclusion of competitors (non-member producers) from the market.

Thus, in our view, the critical question in this case turns, not on some vague general objective of the Capper-Volstead Act, but on whether the conduct charged against the Association or found by the district court is beyond the ambit of § 1 of that Act.

The Capper-Volstead Act does not speak in terms of market control or price control as such. What it does is to permit certain marketing machinery which, if utilized, may bring about a considerable measure of price or market control. But because the Act envisages and permits this kind or degree of control, it does not follow that it permits control achieved by other means. Indeed, a statute which does not in express terms grant any antitrust immunity, as do numerous federal statutes, is hardly to be deemed to grant, purely by implication, the wholesale immunization from the antitrust laws suggested and urged by the Association.

Existing authorities are, we submit, unanimously against the Association's contention that the Capper-Volstead Act immunizes, as to cooperatives, monopolization or unreasonable restraint of trade irrespective of the means (other than agreement with outsiders) employed to monopolize or restrain. See discussion of the *Borden* case and lower court decisions in our main brief (pp. 21–22, 25–27, 33–34). See also Mischler, *Agricultural Cooperative Law*, 30 Rocky

Mountain L.R. 381, 395 (1958); Hulbert, *Legal Phases of Farmer Cooperatives,* Farmer Cooperative Service Bulletin 10, U.S.D.A. (1958) 166–169; Note, 44 Va. L.R. 63 (1958); comment, 107 U. Pa. L.R. 1222 (1959); 57 Mich. L.R. 921 (1959); 73 Harv. L.R. 418 (1959).

2. The Association, in support of its contention that all practices of agricultural cooperatives (except agreements with outsiders) are exempt from the Sherman Act, relies heavily on the debates on H.R. 13931 (66th Cong.) and H.R. 2373 (67th Cong.), the latter of which became the Capper-Volstead Act.[2] But these debates dealt primarily with whether an association should be permitted to obtain a monopoly by gaining control of the entire source of supply in a particular area (see our main brief, pp. 22–25), and not with whether an association could engage in predatory and coercive practices in obtaining such control. Indeed, during the Senate debate it was recognized that members of agricultural cooperatives do not engage in predatory conduct. Thus, Senator Walsh, chairman of the Committee that reported the bill, in speaking of "the milk producers in the State of Virginia and in the State of Maryland," stated that "[t]hey do not resort to any unfair practices at all. They simply organize themselves, and they all unite in one associa-

[2] Excerpts from these debates, which cover over 150 pages of the Congressional Record (59 Cong. Rec. 7851–58, 8016–18, 8021–29, 8031–40; 60 Cong. Rec. 312–318, 360–377; 61 Cong. Rec. 1033–45; 62 Cong. Rec. 2048–54, 2057–61, 2107–23, 2156–74, 2216–30, 2256–81, 2453–54), are set forth in the Appendix to the Association's brief (10a–17a, 18a–20a, 21a–25a, 28a–48a).

tion under the protection of this act; they set up their own distributing system in the city of Washington * * * the association does not resort to unfair practices at all * * *" (62 Cong. Rec. 2164).[3]

Thus, the general statements in the debates upon which the Association relies, that cooperatives which monopolize will be subject only to being proceeded against by the Secretary of Agriculture if they unduly enhance prices, cannot fairly be read as showing a Congressional intent to bar the United States from proceeding directly under the Sherman and Clayton Acts against monopolization (and other antitrust violations) achieved through, or which involve, predatory and coercive conduct directed against non-member competitors. To the contrary, read in the light of the problem that then concerned Congress—whether associations should be barred from monopolizing in the sense of obtaining control of the entire source of supply in a particular market—they meant at most that that kind of "monopoly" was not to be proceeded against directly under the Sherman or Clayton Acts but solely by the Secretary of Agriculture. But with respect to the different problem presented in the instant case—predatory and coercive conduct by the Association—the House Committee report on H.R. 2373 (67th Cong.) makes it clear, we believe, that the Capper-Volstead Act was not intended to preclude a direct antitrust suit by the United States. For that

[3] Similarly, Senator Walsh pointed out (*ibid.*) that "the Raisin Growers' Association out in the State of California * * * are not accused of having done anything wrong to drive their competitors out of business * * *."

report explicity states that if associations authorized by the bill "do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law" (see our main brief, p. 24). "[T]he penalties imposed by that [Sherman] law" plainly are not the same thing as a cease-and-desist order issued by the Secretary of Agriculture.

Two circumstances give added significance to the above authoritative statement. One is that in the 67th Congress the report of the House Committee repeated verbatim the paragraphs of the Committee's report on the bill in the preceding Congress, but added certain paragraphs, including the one which stated that if the authorized associations violated the Sherman Act they would be subject to the penalties "imposed by that law".

The other significant circumstance is that § 1 of the bill as reported by the House Committee in the 66th Congress provided that agricultural producers may act together in membership associations in collectively marketing their products, and may organize and operate such associations and "make the necessary contracts and agreements to effect that purpose, *any law to the contrary notwithstanding*: * * *" (59 Cong. Rec. 7851); but that the italicized words were omitted from the bill reported by the Committee in the 67th Congress (61 Cong. Rec. 1033). This deletion was made after opponents of the bill had protested, in the 66th Congress, that the "any law to the contrary notwithstanding" phrase would give the associations complete exemption from the antitrust laws (see, for example, the remarks of Representative Igoe (59

Cong. Rec. 8031, 8038–39)). Despite the assurance given by proponents that the phrase was inserted in order to insure that the mere forming of a cooperative through which farmers could market their products would not be held to be a violation of the law, opponents had insisted that the purpose of the phrase was to place cooperatives beyond the reach of the antitrust laws (60 Cong. Rec. 316–18). The deletion therefore dovetails with the insertion of the paragraph as to Sherman Act liability in the Committee report in the 67th Congress.

Moreover, when this Court held in *United States* v. *Borden Co.*, 308 U.S. 188, 206, that "the procedure under § 2 of the Capper-Volstead Act * * * is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under § 1 of the Sherman Act," it did so after full development of the argument (with extensive citations to legislative history and Congressional debates) that Congress, in enacting the Capper-Volstead Act, intended to withdraw combinations, contracts and agreements of agricultural producers from the purview of the Sherman Act.[4] Thus, in the instant case the Association, in contending that § 2 of Capper-Volstead provides the exclusive method for dealing with antitrust violations (not involving conspiracy with outsiders) by cooperatives, is asking this Court to adopt an interpretation of that Act which had been squarely presented in *Borden* and unanimously rejected.

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[4] See the briefs in *Borden* of The Borden Company (pp. 9–21, Appendix C, pp. 69–90) and of Pure Milk Association (pp. 51–66).

3. The specific statements in the debates upon which the Association relies are subject to further infirmities. A number of them involve interpretations of the Act which this Court rejected in *Borden*. Thus, although the Association emphasizes (Br. 59) Congressman Volstead's statement that "in the event that there is a complaint against them [cooperatives] they will not be subject to criminal prosecution," this Court in *Borden* upheld an indictment of a cooperative. It pointed out (308 U.S. 206) that "[t]he Sherman Act authorizes criminal prosecutions and penalties," and that a proceeding by the Secretary of Agriculture under § 2 of Capper-Volstead "is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies." Similarly, the views of Congressman Sumners and Senator Kellogg that the Secretary of Agriculture was to have primary jurisdiction in proceedings against cooperatives (Br. 61–62) are directly contrary to this Court's holding in *Borden* (*ibid.*) that since § 2 of Capper-Volstead "contains no provision giving immunity from the Sherman Act in the absence of a proceeding by the Secretary," the Act does not give the latter primary jurisdiction with respect to violation of the Sherman Act by agricultural cooperatives.

Senator Borah's statement (Br 57) that the proposed bill "deprives the court, in the first instance, of examining into the question of whether or not they [cooperatives] have violated the law * * * and provide[s] another tribunal before which they can have

their hearings," was not made during the 67th Congress which passed the Act, but during the preceding Congress which had before it a bill in significantly different form. For the bill in the 66th Congress authorized cooperatives to perform certain functions, "any law to the contrary notwithstanding"; the quoted words were omitted from the bill reported by the House Committee in the 67th Congress after opponents of the bill had protested in the earlier Congress that this phrase would give the associations complete antitrust immunity (see, *supra,* pp. 6–7). Furthermore, Senator Borah's comments were made in opposition to the bill, and as such cannot be deemed to reflect the intention of the Congress. Opponents of a measure naturally tend to exaggerate its allegedly dire consequences in attempting to defeat it. Finally, the full text of the colloquy between Senator Borah and Senator Sterling (60 Cong. Rec. 315–316), during which the statement relied upon was made, indicates that the subject under discussion was the necessity for making explicit that agricultural cooperatives were not, in themselves, combinations in restraint of trade. We repeat that neither this history, nor the other material upon which the Association relies, contains any indication that Congress intended to confer a Sherman Act exemption upon agricultural cooperatives for the kind of predatory and coercive practices here involved.

4. We deem irrelevant the following points made by the Association (Br. 48–52): that Congress chose to provide for administrative enforcement of § 2 of Capper-Volstead by the Secretary of Agriculture

rather than the Federal Trade Commission; that the § 2 procedure is partially patterned on the enforcement procedures of §§ 11 and 15 of the Clayton Act; and that, unless § 2 gives antitrust immunity, an agricultural cooperative "becomes liable to a triple enforcement scheme". Since § 2 of Capper-Volstead is merely a limitation on rights conferred by § 1 of the Act, the choice made by Congress as to the procedure appropriate for enforcement of § 2 has, we submit, no bearing upon the issue presently pertinent as to § 2, namely, whether it impliedly immunizes from the antitrust laws conduct not within the authorization of § 1 of the Act. And since § 2 does not provide for or relate to enforcement of the antitrust laws, it is not an additional or "triple" method of enforcement. So far as the antitrust laws are concerned, § 2 merely provides the procedure for enforcing a limitation on such *exemption* from these laws as results from the legalization, by § 1 of Capper-Volstead, of the conduct there authorized.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
ROBERT A. BICKS,
Acting Assistant Attorney General.
CHARLES H. WESTON,
IRWIN A. SEIBEL,
JOSEPH J. SAUNDERS,
RICHARD H. STERN,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 62

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *Appellant*

v.

UNITED STATES OF AMERICA

No. 73

UNITED STATES OF AMERICA, *Appellant*

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

On Appeals From the United States District Court for the District of Columbia

RESPONDING BRIEF FOR THE MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

WILLIAM J. HUGHES, JR.
821 Fifth Street, N. W.
Washington 5, D. C.

HERBERT A. BERGSON
HOWARD ADLER, JR.
DANIEL H. MARGOLIS
918 16th Street, N. W.
Washington 6, D. C.

Attorneys for Maryland & Virginia Milk Producers Association, Inc.

BERGSON & BORKLAND
918 16th Street, N. W.
Washington 6, D. C.

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On Appeals From the United States District Court for the District of Columbia

---

RESPONDING BRIEF FOR THE MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

On November 9, 1959, the Association and the United States filed briefs on the merits in these appeals. The Association's brief was devoted exclusively to the inapplicability of conventional antitrust enforcement to

farmer cooperatives when acting apart from combination or conspiracy with outsiders, the issue central to both appeals. In the present brief, the Association will respond in Part I to the Government's arguments predicated on ordinary and, we think, inapplicable antitrust standards; Part II will deal with the questions relating to relief raised by the Government on its cross-appeal in No. 73.

QUESTION PRESENTED RELATING TO RELIEF

In the event the Association is held by this Court to be accountable under the antitrust laws for the Embassy acquisition, the question presented by the cross-appeal in No. 73 will be whether the district court erred as a matter of law in rejecting additional judgment provisions proposed by the Government

(a) to require divestiture by the Association not only of "assets acquired" from Embassy Dairy, Inc. and "replacements therefor," but also of all later-acquired assets useful in, but not necessary for, the operation of the dairy;

(b) to prohibit the Association from engaging in the wholesale or retail distribution of milk pending divestiture (other than through Embassy) and for ten years thereafter;[1]

(c) to forbid the Association for twenty years[1] from acquiring any business engaged in the sale or

[1] In this Court, the Government has receded from its original position as to the duration of post-divestiture prohibitions against operating or acquiring a milk distributing business. It now suggests that the period of any ban against the Association's operating as a milk dealer "might appropriately be left to the district court to determine" (Gov. Br. 49), and that "five years might perhaps be appropriate" for the ban against acquisition of another milk business (Gov. Br. 51 n. 27).

distribution of milk without prior showing to the court that such acquisition would not substantially lessen competition or tend to create a monopoly; and

(d) to supplement the provisions for periodic reports by the Association and continuing jurisdiction by the court by granting the Government not only sweeping visitation privileges over the books, records and personnel of the Association, but also the right to require defendant to submit such written reports under oath as the Government might demand.

SUMMARY OF ARGUMENT

I. The Government's brief, written as if monopolization and vertical integration by an authorized Capper-Volstead cooperative monopoly can be tested by conventional antitrust standards, misconceives the legal status of farmer cooperatives, the record in this case, and the decisions of this Court.

A. The Government contends that the Capper-Volstead Act simply establishes that farmer cooperatives are to be treated on a "parity" with ordinary business corporations, yet it concedes that in several vital respects cooperatives may violate antitrust standards without incurring antitrust penalties. The "parity" theory starts to crumble when the Government admits, as it must, that farmers may band together without limit as to number or market share (Gov. Br. 14, 24-25). While, at first, the Government describes the resulting combination as a mere "colloquial" monopoly having only a "supply-control position" (*ibid.*), later it is forced to acknowledge that the Capper-Volstead Act "permits an agricultural asso-

ciation to obtain a degree of control over supply which, in the case of an ordinary corporation, might constitute unlawful monopolization" (Gov. Br. 32). While the Government does not so completely abandon its "parity" theory with respect to a producer cooperative's acquisition of retail outlets, it does acknowledge that a producer cooperative is authorized to extend its operations into distribution and marketing and is not limited to "building up its own dealer organization" but may for legitimate reasons even acquire "the assets and business of an existing dealer" (Gov. Br. 35, 38). The legality of such a vertical acquisition is said to depend on its purpose or effect, but the Government is unable to formulate any realistic or coherent standards. Thus, in some places the Government seems to take the position that a cooperative's acquisition of a dealer will be lawful or unlawful depending upon whether the acquired dealer had been its customer or the customer of competitors (Gov. Br. 39). Yet in its later arguments on relief (Gov. Br. 50) and in its earlier arguments on monopolization (Gov. Br. 20), it takes the more conventional antitrust position that the legality of vertical integration by a producer monopoly is not affected by any question as to who formerly supplied the acquired dealer.

The Government's attempt to maintain its "parity" theory of antitrust liability between cooperatives and ordinary corporations is in sharp contrast to its own argument 20 years ago in the *Rock Royal* case where it successfully urged this Court to recognize that a wealth of agricultural cooperative legislation had created "exemptions result[ing] in definite competitive advantages to such associations." Brief for the United States, page 137, *United States* v. *Rock Royal*

Co-op., 307 U.S. 533 (1939). We submit that the Government's hypothesis of antitrust parity cannot be maintained without disregarding the clear purpose of the Capper-Volstead Act and the long history of preferred treatment for agricultural cooperatives.

B. The Government next contends that monopolistic purpose or effect, not sanctioned by the Capper-Volstead Act, is demonstrated by the "excessive" purchase price paid for Embassy and the "substantial losses" incurred as a result of the acquisition. As a matter of cold fact, not disputed anywhere in the record, the evidence showed that federal agricultural agencies found the purchase price to be reasonable and that substantial operating profits inured to the Association's members as a result of the acquisition. The Baltimore Bank for Cooperatives, which financed the Embassy purchase, found as required by the Agricultural Marketing Act that the purchase price was "reasonable." It made this finding after the Farmer Cooperative Service of the Department of Agriculture had advised it that the high purchase price of Embassy as an ordinary dairy business was justified by the unique and substantial extra value to a cooperative of securing an outlet which would divert Class III surplus milk to Class I fluid uses, thereby substantially raising the returns to members. The Government's argument that the Association's purchase of Embassy resulted in a loss of almost 1½ million dollars in the first 2½ years (Gov. Br. 36 n. 17) is absolutely incredible in light of the fact that the data on which it is based was conceded on cross-examination by the Government witness who prepared it to have failed to take into account the movement of 16 to 18,000 gallons of milk daily from the Class III price of $3 to the

Class I price of $6.62 (R. 295, 576). The undisputed fact is that the Embassy acquisition resulted in a profit of several million dollars to the members of the Association (R. 360). A further value acquired by the Association was the seller's covenant not to compete in the market for ten years. This was not only a normal and lawful ancillary covenant but was specifically counselled by the Farmer Cooperative Service to be included when cooperatives purchased milk distributing businesses. The district court made no finding whatever reflecting on the reasonableness of the covenant. And although the acquisition eliminated Embassy Dairy as an outlet for the milk of independent producers, the Government conceded that all independents were welcome to join the Association (R. 137) and the testimony was undisputed that the Association was willing to, and did, buy milk from producers regardless of the fact that they were not members (R. 390). In any event, contrary to the contention of the Government, the legislative history of Capper-Volstead demonstrates that cooperatives are authorized to secure such control "that all other producers of that particular community will be obliged to leave the field."

C. Finally, the Government contends, contrary to its own jurisdictional statement in this case, that *United States* v. *Borden Co.*, 308 U.S. 188 (1939), involving conspiracy with outsiders, is "dispositive" of an antitrust case against a cooperative acting alone. Every decision of this Court denying the exemption of farmer cooperatives, and of labor unions, as well, has been predicated on the existence of conspiracy with and for the benefit of non-exempt parties. This Court has never denied exemption where the exempt organi-

zation restrained trade solely by its own activities and for its own benefit.

II. The Government urges that in the event this Court holds the Association to be subject to conventional antitrust enforcement, the judgment entered by the district court should be modified. The court's judgment affords appropriate and effective relief. The Association is ordered to dispose of Embassy "as a going dairy business"; pending divestiture the Association must administer the Embassy assets "in good faith," and must make periodic reports to the court on its efforts to effect the divestiture; and the court retained jurisdiction to enable either party to apply for such further orders as may be required for the full effectuation of the judgment. This Court has always recognized that "[t]he framing of decrees should take place in the District rather than in Appellate Courts," *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401 (1947), and it has been particularly reluctant to intervene where, as here, the district court has retained jurisdiction and is thus able "to take the necessary measures to cause the decree to be fully and faithfully carried out." *Associated Press* v. *United States*, 326 U.S. 1, 22 (1945).

The Government seeks four specific modifications of the district court's decree: (a) The Government contends that by failing to require divestiture of assets added to the Embassy operation, other than as replacements, the judgment may make it possible for the Association to divest an outmoded and competitively insignificant Embassy Dairy. The decree, however, requires divestiture of a "going dairy business" and its "good faith" requirement, particularly as explained by the court in the hearing on relief, provides assurance

that the Association will not be permitted to withhold assets essential to Embassy's continued operation as a competitively significant dairy business. (b) The Government also urges that the judgment should have prohibited the Association from operating any dairy other than Embassy pending divestiture and for an unspecified period thereafter. As the court made abundantly clear in the hearing on relief any attempt to siphon off the Embassy Dairy assets or customers to another dairy operated by the Association pending divestiture would be subject to the decree's "good faith" provisions. Insofar as this provision is aimed at any fancied post-divestiture dilution of Embassy, it would impose an absolute and unwarranted prohibition against the Association's re-entry into the milk distribution business, even though such re-entry might be essential to the marketing of its members' milk, and would in no way lessen competition or tend to monopoly. (c) The Government further contends that the Association should be prohibited for a period of years from acquiring any milk business in the Washington market without prior notice to the United States and without satisfying the court that the acquisition will not lessen competition or tend to monopoly. The Government advances no valid reason for interfering with the exercise of the district court's discretion in denying this relief. It gives no reason whatever for shifting the burden of proof, and, although it asserts that the present record "demonstrates the difficulty of undoing a consummated acquisition in the dairy business," it points to nothing in the record supporting this assertion. We submit that, in fact, the record demonstrates that the Association has operated Embassy as a separate division and, if the district court's order should be sustained, would be able to dispose of it as

a fully operating and competitively significant dairy business. (d) Finally, it is urged by the Government that the district court erred in refusing to confer broad visitation rights on the Government and to require the Association to furnish such written reports under oath as the Government might demand. While this Court has in appropriate cases upheld the grant of visitation rights, it has always deemed it to be a matter for the district court's discretion. Here there was no abuse of discretion. Moreover, this Court has expressly condemned provisions requiring the filing of written reports upon demand of the Department of Justice. *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 728 (1944).

ARGUMENT

I. THE GOVERNMENT'S SUBSTANTIVE ARGUMENT MISCONCEIVES THE LEGAL STATUS OF FARMER COOPERATIVES, THE RECORD IN THIS CASE AND THE DECISIONS OF THIS COURT

A. The "Parity" Theory of the Capper-Volstead Act

The Government's basic position is that the Capper-Volstead Act did no more than place farmer cooperatives on a "parity" with ordinary "business corporations" (Gov. Br. 14, 15, 22). It frankly acknowledges that Capper-Volstead authorized farmers in a locality to band together without limit as to "number or proportion" and thereby "establish a monopoly" in the market (Gov. Br. 24). But the economic power and competitive implications of "this kind of 'monopoly'" (*ibid.*) are nowhere explored, and the innocent terminology by which the "monopoly" is characterized by the Government might lead the casual reader to believe that the Capper-Volstead Act created a new,

emasculated economic animal—a monopoly devoid of monopoly power. Thus a farmer cooperative "controlling the entire source of supply in a particular area" (Gov. Br. 25) is spoken of as possessing simply a "supply-control position" (Gov. Br. 14, 28). Such a cooperative, the Government says, obtains a monopoly only in the "colloquial sense" (Gov. Br. 25). No legal significance is to be attributed to it; it is a mere technicality. Even the Senate's rejection in 1922 of the Judiciary Committee's proposed antimonopoly amendment[2] to the bill which became the Capper-Volstead Act gives the Government no pause in its argument that Congress intended no more than to establish complete substantive and procedural antitrust "parity" between cooperatives and other corporations (Gov. Br. 24-25).

Two-thirds of the way through the Government's brief, however, the "parity" theory collapses. At page 32, the Government makes the inevitable concession to reality and acknowledges that the Capper-Volstead Act "permits an agricultural association to obtain a degree of control over supply which in the case of an ordinary corporation, might constitute unlawful monopolization" (Gov. Br. 32). Thus, the Government itself contradicts the only point made in its truncated discussion of legislative history, i.e. that certain paragraphs of House Report 24 of the 67th Congress, considered by themselves, contain language which implies full application of the antitrust laws to farmer co-

[2] The Government's off-hand interpretation and dismissal of this antimonopoly amendment in two sentences appears to have been drafted in complete oblivion of the wholly contrary meaning which the legislative history unmistakably discloses. Compare Gov. Br. 24-25 with Assn. Br. 53-57, App. 26a-47a.

operatives.[3] The balance of the brief will be searched in vain for any return to the notion of antitrust "parity" between cooperatives and corporations on the production level.

The residue of the Government's argument is devoted to the effort to maintain the "parity" theory with respect to vertical integration. The Government's point here is that this Court must reject any interpretation of the Capper-Volstead Act which confers upon a cooperative that "enters upon a field of distribution new to it" any "privilege to violate the antitrust laws denied to ordinary trading corporations" (Gov. Br. 37). The argument begins by limiting to the production level the prior concession regarding a cooperative's right of otherwise "unlawful monopolization"; no extension into distribution and marketing is to be countenanced (Gov. Br. 33). The Capper-Volstead Act, it is said, allows no use of a cooperative's monopoly position in production to beget monopoly in the "retail market" (*ibid.*). The "empire" in supply may not be extended by "exclusionary means" (*ibid.*).

But the firmness of of this argument begins to wilt two pages later when the Government acknowledges that an association "does not necessarily exceed the statutory authorization if, instead of gradually building up its own dealer organization, it acquires the assets and business of an existing dealer" (Gov. Br. 35, 38). The critical factor in such a case, suggests the Government, is not so much the effect of the acquisition as the cooperative's purpose in making it

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[3] For the true meaning of the House Report and the legislative history of Capper-Volstead considered in its entirety, see Assn. Br. 44-65, App. 7a-48a.

(Gov. Br. 37). Vertical integration by acquiring an independent dealer is assumed to be perfectly proper so long as the cooperative demonstrates either a "purpose to perform the function of distribution more efficiently than existing distributors" or a "purpose to share in the normal profits of the business of distribution" (Gov. Br. 38 n. 18). In such circumstances, the Government admits, an acquisition may well be "necessary" within the meaning of Section 1 of the Capper-Volstead Act, to "effectuate the collective-marketing purposes of a Capper-Volstead association" (Gov. Br. 38).

But this limited concession to the intended meaning of the Capper-Volstead Act is short-lived in the Government's brief. Regardless of whether or not acquisitions are "necessary" for collective marketing purposes, cooperative control of 86% of the milk supply in the market, previously passed off as a mere "supply-control position" or "colloquial" monopoly, is urged as requiring severe restraints on acquisitions of distribution facilities because "any additional engrossing of that market by the Association necessarily would pose a serious anti-competitive threat" (Gov. Br. 50). As so plainly stated by the Government to this Court earlier in this case:[4]

> Appellee's acquisition of any of the limited number of dairies operating in the Washington Metropolitan area, when appellee controls 86% of the fluid milk sold in that area, would give rise to at least dangerous probability of a violation of the antitrust laws. In these circumstances, absence of a pattern of past illegal conduct is not determinative.

[4] Brief in Opposition to Motion to Dismiss in Part, No. 73, page 6.

Such a view of vertical integration by a monopoly is not at all surprising. It is, after all, the only position consistent with conventional antitrust doctrine under the Government's sometime "parity" theory. But this position demonstrates strikingly the departure of the Government from its theory that the acquisition of Embassy was unlawful principally because Embassy had been the outlet for the milk of competitors, i.e. nonmembers of the Association (Gov. Br. 39). Ordinarily, the Government would never contend that the legality of a producer-monopoly's purchase of a distributor depended on whether or not, at the moment of acquisition, the dealer happened to be a customer of the monopoly. Any such acquisition would be said to affect competition, actual or potential. Thus, under any theory of antitrust "parity" between cooperatives and corporations, it is inconceivable that the Government—despite its repeated reliance on the "foreclosure" of nonmember producers—would concede that antitrust liability could have been avoided here had the Association, instead of acquiring Embassy, bought Chestnut Farms Dairy or some other substantial dealer in the market which at the time of acquisition was a 100% customer of the Association.

The Government's inability to maintain any antitrust distinction between a cooperative's purchase of distributors based on whether or not they purchased the cooperative's milk is illustrated by the record in this case. First, in prosecuting its unsuccessful Section 7 case (Gov. Br. 11 n. 9) against the Association's acquisition of the Richfield-Wakefield Dairy, an Association customer (Gov. Exh. 27, R. 573), the Government claimed that the purchase was motivated by a

desire to retain that dairy as an outlet for Association milk (R. 365-6). The Richfield-Wakefield allegation was also particularized under ¶ 22b of the Amended Complaint (R. 72) as a means by which the Association supposedly eliminated competing producers from the market in violation of Section 2 of the Sherman Act. The attack on this acquisition of a customer-dealer is by no means abandoned in this Court. The purchase of Richfield "to preclude it from being an outlet for milk supplied by others" (Gov. Br. 29) is relied on by the Government here in support of its charge of monopolization "beyond the ambit of any Capper-Volstead authorization" (Gov. Br. 31). Yet at the time of its purchase in December 1957, Richfield-Wakefield (then known as Wakefield) was a hopelessly failing corporation (Gov. Br. 11 n. 9; R. 495) which, in sharp contrast to Embassy, was then buying 100% of its milk from the Association (Gov. Exh. 120-J, R. 676).

Similarly, the Government sought to introduce into the Embassy trial evidence relating to an alleged unsuccessful attempt by the Association in 1954 to purchase Harvey Dairy, then also a 100% customer of the Association (Gov. Exh. 27, R. 573). Said Government counsel (R. 395):

> We want to show the Court that the Association sought to purchase Harvey to retain its business.

The district court excluded the showing as irrelevant (*ibid.*). The Harvey Dairy incident is also particularized as an unlawful attempt to monopolize under ¶ 22b and d of the Amended Complaint (R. 39, 40). At the time of the alleged offer, Harvey Dairy possessed, ac-

cording to the Government, only a 2.7% share of the market (Gov. Exh. 91, R. 632).[5]

The Government's uniform assault on the Association's transactions involving different dealers, differently situated, serves to illustrate how the antitrust laws could and would be used to attack the acquisition or attempted acquisition of any dealer by a farmer cooperative. If the dealer has been a customer of the cooperative's competitors, its acquisition is said to be vulnerable because it will "exclude competitors from the market" (Gov. Br. 39). If the dealer instead was the cooperative's own customer, its acquisition will be prosecuted on the ground that it will "preclude [the dealer] from being an outlet for milk supplied by others" (Gov. Br. 29).

The Government's sweeping demand for relief, embracing not only divestiture of the Association's sole fluid milk outlet but seeking to circumscribe future acquisitions as well (Gov. Br. 47-51), emphasizes the essential all-or-nothing thrust of its case: if the antitrust laws are applicable to the Association's acquisition of Embassy, they apply equally to all acquisitions of marketing outlets by farmer cooperatives. The alternative, urged in our principal brief, is that they do not apply at all, but are replaced by the Capper-Volstead Act.

When studied in its totality, the Government's brief refutes itself. Farmer cooperatives are to be treated on a "parity" with ordinary business corporations,

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[5] The eventual loss of Harvey Dairy on October 1, 1954, as a Class I outlet for Association milk was one of the factors that led the Department of Agriculture to issue the recent Federal Marketing Order No. 2 for the Washington area. 24 Fed. Reg. 3630, 3631 (1959).

except that cooperatives may monopolize in situations that would be unlawful for all others. Cooperatives may integrate vertically into retail marketing if "necessary" to carry out their purposes, except that when the cooperative is large—as admittedly it is authorized to be (Gov. Br. 24)—any such integration will "pose a serious anti-competitive threat" (Gov. Br. 50) and should therefore be enjoined. The distinctions the Government so carefully weaves in making one argument unravel promptly when it begins making another. The lines drawn by the Government on one page of its brief are erased by it on the next. "Purpose" is the test except where it proves to be innocent; in such cases "effect" will be controlling. Acquiring an outlet of competitors is "exclusion"; acquiring the cooperative's own customer is "preclusion." In the conventional administration of the antitrust laws such flexibility may be hornbook and proper; in the realm of lawful farmer cooperative monopolies authorized to integrate vertically, these flexible concepts could condemn all acquisitions and effectively repeal their authorizing statute.

In our view, the Government's inability to formulate a coherent theory to accommodate cooperatives and antitrust is the inevitable result of attempting to apply conventional competitive standards to an authorized monopoly. The Government's plight serves to emphasize the wisdom and demonstrate the need that prompted the 67th Congress in 1922 to establish Capper-Volstead as the exclusive standard and procedure for dealing with monopolistic conduct by farmer cooperatives when acting alone. Interestingly, the Association is not alone in disputing the notion of "parity" advanced by the Government in this case; that notion

has previously been repudiated by the Government itself. In 1939, in the course of successfully urging this Court to sustain privileged treatment of farmer cooperatives in the *Rock Royal* case, the Government relied on the exemptions and benefits which state and federal law already conferred on cooperatives. Its argument there was founded not on the theory that such laws place cooperatives on a "parity" with others, but that "such exemptions result in definite competitive advantages to such associations." Brief for the United States, page 137, *United States* v. *Rock Royal Co-op*, 307 U.S. 533 (1939). We believe the Government was right in 1939 and is wrong today.

B. The Government's "Excessive Purchase Price" Arguments

Completely ignoring the Association's unique status as a producer cooperative with surplus milk, and erroneously equating the Association with an ordinary distributor of milk, the Government seizes upon an isolated finding of the district court that the price paid by the Association was "far in excess of the actual and intrinsic value of the property purchased" (Gov. Br. 8, 9, 15, 36). Coupling this with shreds of evidence recited in such a way as to intimate that the post-acquisition operation of Embassy has resulted in "substantial operating losses" to the Association (Gov. Br. 36 n. 17), the Government leaps to the conclusion that it is "abundantly clear" that Embassy's purchase "was motivated by considerations other than a desire on the part of the Association that it secure for its members the profits incident to conducting the business of a dealer" (Gov. Br. 36). This conclusion, as well as the "facts" relied upon to reach it, reveal an astonishing misconception as to the financial considerations that

prompted the purchase of Embassy, the substantial direct financial benefits to the Association's farmer-members, and the careful appraisal and approval of the purchase price and anticipated benefits made by the Department of Agriculture and the Bank for Cooperatives. None of these matters is in dispute; they are in fact disclosed largely by official documents introduced into evidence by the Government itself.

The price paid by the Association for the acquisition of Embassy was found to be "reasonable" by the Baltimore Bank for Cooperatives. That finding, made pursuant to statute, has never been challenged, even though the Department of Justice was fully aware of it. In explaining to the Department, prior to trial, its loan of $2,100,000 to finance the Association's purchase, the Bank stated (Gov. Exh. 114, R. 657):

> . . . in approving this loan the Bank did comply with the provisions of 12 U.S.C. 1141 by making the necessary determination that the loan would be in furtherance of the policy declared by the Congress in 12 U.S.C. 1141a.

The Bank also quoted to the Department the provision of the Agricultural Marketing Act that precluded it from making a loan to a cooperative for the acquisition of physical facilities "unless the Governor of the Farm Credit Administration finds that the purchase price or rent to be paid is reasonable" (Gov. Exh. 114, R. 656; 12 U.S.C. §1141e (c)(2)). Finally, the Bank gave to the Department the loan agreement itself, which commenced by reciting that "The findings required by law having been duly made. . ." (Gov. Exh. 114, R. 659).

The Bank's finding of reasonableness was based on full knowledge of the competitive and financial implications of the purchase. Its report noted that despite the "very substantial profit" (Gov. Exh. 27, R. 574) which the owner of Embassy would reap from the sale, it seemed (*ibid.*, R. 576)

> reasonable to expect real, immediate financial benefits in substantial amounts by the diversion of some 20,000 gallons daily of the present Association surplus to Class I and II distribution through the Embassy plant and other handlers depending upon the Association for their milk supply.

The anticipated benefits to the Association's producers that seemed to the Bank to have "merit" ranged close to $2,000,000 annually (*ibid.*, R. 575-6).

The Bank's financial analysis rested in part on the study and conclusions of Donald E. Hirsch, Chief, Dairy Branch, Farmer Cooperative Service, Department of Agriculture (*ibid.*, R. 576). Hirsch noted that the purchase price was considerably above Embassy's market value as an ordinary dairy business (Def. Exh. 19, R. 711-12). But Hirsch went on to find that "market value" was an inadequate standard by which to measure purchase price when appraising Embassy's value to a farmer cooperative much of whose milk was then being disposed of as surplus at the low Class III price. He stated (*ibid.*, R. 715):

> The effect of the purchase on operation of the market-wide pool appears to justify paying in excess of the market value of the business.

His reason was clear (*ibid.*):

> A considerable volume of milk of Maryland-Virginia members can be shifted from surplus to Class

> I and II use. This will mean, under current conditions, an increase in value of such milk of approximately $3 per hundredweight.

On this basis, Hirsch concluded that the Association's purchase of Embassy at the contract price would afford "an unusual opportunity to increase average returns to members through purchase of the Embassy milk distributing business" (*ibid.*, R. 717).

These predictions, coupled with the fact that they came true, make ridiculous the Government's assertions that the Association acquired Embassy for "considerations other than . . . profits" and that it was "willing and eager" to overpay "without regard for the actual earnings of the business" (Gov. Br. 36). The computations offered to show that the acquisitions caused "substantial operating losses" to the Association amounting to $1,362,000 in the first two and a half years of Embassy's operation by the cooperative (Gov. Br. 36 n. 17) are positively astonishing in light of the unqualified admission by the Government's own accountant, who prepared the very data relied on (Gov. Exh. 87, R. 628), that he had neglected to "take into account the fact that the Association moved from 16 to 18 thousand gallons of milk [daily] from the Class III price of $3 into the Class I price of $6.62" (R. 295, 576). The overwhelming significance of this omission was pointed up by the president of the Association who testified without contradiction that (R. 360)

> by moving Class III milk into Class I channels by means of the operation of the dairy it meant an increased income of a million or a million and a half dollars a year. So it definitely, from the standpoint of the organization as an integrated operation, was a good proposition . . .

Thus, instead of losing over $1,300,000, as claimed by the Government, the Association made several million dollars in the integrated operation of Embassy.

Against this background, the district court's correct finding that the Association paid considerably more than "the actual and instrinsic value of the property purchased" (R. 491) is far removed from any finding or implication that the purchase price was unreasonable, or that it in any way exceeded the value of Embassy to its farmer purchasers as a Class I outlet for their surplus milk. The court's finding, as the Government has indicated (Gov. Br. 8), was limited to a comparison of the purchase price with Embassy's tangible assets. In fact, the court deemed irrelevant evidence that in acquiring Embassy Dairy the Association secured not simply the normal business of a distributorship but the additional profits that its farmer-members would realize from selling approximately 20,000 more gallons of milk daily at the much higher Class I and Class II prices (R. 295-97; compare Gov. Br. 36).

Moreover, the court's finding, being limited to the tangible assets transferred, gave no weight to the non-competitive agreement by which Embassy's former owners agreed to stay out of the Washington market for ten years. This ancillary covenant was of great value in achieving the Association's purpose of marketing more of its members' milk in the higher price classifications, for immediate re-establishment of Embassy's former owners in the Washington market would necessarily have diluted the benefits of the Embassy purchase. For the Association to have failed to secure such a covenant would have been an omission

of considerable imprudence even by ordinary business standards. Since the landmark decision in *United States* v. *Addyston Pipe and Steel Co.*, 85 Fed. 271 (6th Cir. 1898), such restrictive covenants have been universally acknowledged to be necessary and lawful when ancillary to the *bona fide* sale of a business. The Government made this very point in its Brief in Opposition to Motion to Dismiss in Part, at page 5. There is no lesser need for such lawful protection in the case of a farmer cooperative's purchase of a business. In fact, the Farmer Cooperative Service expressly advised dairy cooperatives, several months prior to the Embassy acquisition, to take into consideration when purchasing a milk distributing business the effect on "the values of intangible assets" of the question:[6]

> Will the seller agree to refrain from engaging in milk distribution in the area for some specified period of time of reasonable length?

[6] Hirsch, *Estimating the "Market Value" of the Milk Distributing Business*, Farmer Cooperative Service General Report 3 (April 1954), pages 27-8. The same publication counseled dairy cooperatives contemplating the purchase of a distributorship to inquire: "Would purchase of the business provide additional marketing opportunities? (For example, the purchaser might then be able to participate in a market-wide pool resulting in higher average prices each year to its producers. In the case of a dairy manufacturing organization, purchase of the business might provide a means of entry into milk distribution and perhaps a chance to increase returns to producer-patrons. In addition to the chance to use some of its own qualified milk in high-return bottled products, the purchasing organization might add sales outlets for distribution of its manufactured dairy products)" (*id* at 32). They were also advised to examine the "competitive situation" and determine "How prevalent are established discounts? Uneconomic price cutting? (These directly affect opportunities for realizing operating savings)" (*id* at 31).

The Government's characterization of the non-competitive agreement between buyer and sellers here as a "conspiracy" in no way alters its reasonableness, its ancillary nature or its legality, and the district court made no finding whatever to the contrary.

The mere fact that after the acquisition the Association supplied all of Embassy's fluid milk requirements does not mean that the independent producers who formerly shipped to Embassy were excluded or foreclosed from the market. As conceded by the Government, these producers were welcome to join the Association: "it would have been pleased to take them under their wing" (R. 137). More than one third did join the Association, and another third found other outlets in the Washington market (Gov. Exh. 88, R. 629). And the general manager of the Association testified that the Association was willing to buy milk from nonmember producers (R. 390). The record is empty of any evidence that the Association sought to exclude any farmer from the Washington market.[7] There is no showing that even one producer complained of injury or foreclosure or that even one producer was refused membership in or service by the Association. In fact, not one of the former Embassy shippers was

[7] The Government's charge of "exclusion" is based entirely on charts and tables showing where the former Embassy suppliers went after the acquisition (e.g. Gov. Exh. 88, R. 629; see Def. Exh. 56, not printed). The district court found no exclusion. The only finding it did make, that producers were "unable" to find an outlet in the market unless they joined the Association, is without foundation in the record, and is expressly contrary to the response, quoted in the text above, which the court itself elicited from the Association's manager.

called as a witness at trial.[8] Moreover, although the Government asserts that Capper-Volstead does not permit a cooperative to tie up outlets so that producers must either join the Association or market through it, its support for this assertion consists entirely of two highly misleading, out-of-context statements on the floor of the Senate (Gov. Br. 31 n. 13).

Both of the statements relied on by the Government were made during the debate on Senator Walsh's proposed amendment to require Capper-Volstead associations to admit any qualified producer to membership. Senator Kellogg, who opposed the amendment, declared "I do not think that one organization should be required to take everybody into its fold." Immediately thereafter he asserted that nonmembers of a producers association "ought to be allowed to stay out and to sell their products individually or collectively or in any way they please" (62 Cong. Rec. 2267). The Government relies on the latter statement, although the full context makes clear that Senator Kellogg was speaking only of the right of associations to exclude producers from membership. The statement attributed to Senator Walsh is even more misleading. It was the essence of his argument that the Capper-Volstead bill vested such great power in producer cooperatives that his amendment should be adopted. After acknowledging that under the bill as it stood (and as ultimately enacted) farmers were free to organize "20 different associations," he went on to the explain the reasons for

[8] The absence of any testimony from persons in the best position to know whether there was any injury or exclusion of producers "is itself persuasive that their testimony, if given, would have been unfavorable" to the Government. *Interstate Circuit* v. *United States*, 306 U.S. 208, 226 (1939).

his proposed amendment. This explanation, which immediately follows the language quoted by the Government, makes plain that Chairman Walsh understood that Capper-Volstead, if enacted, would empower cooperatives to exclude independent producers from the market. He said:

> Senators will bear in mind that the bill as they are asked to give it their approval authorizes the farmers to go so far with their organization and to get so many producers in it as to constitute a monopoly of the particular product in which they are interested, so that all other producers of that particular community will be obliged to leave the field. As in the case of the raisin growers, those who are left outside of the monopolistic organization may constitute a mere modicum and they will have no way of getting their products on the market at all. If they do not want to organize a separate association or if they are so few in number that they can not do so profitably they ought to be permitted to come into the monopolistic organization upon exactly the same terms as their neighbors are admitted to membership. It ought not to be placed in the power of this monopolistic organization to drive out of existence and out of the business in which they are engaged the men who do not happen to come in until the association embraces a sufficient membership to constitute a monopoly of the business. If should be borne in mind, Mr. President, that it is proposed to give them the power to organize until they have a sufficient membership to enable them to control the market and have no competitor whatever. Of course, if they care to exercise the power, then they can kill off every other man who is engaged in the same business and who has to market in the same place. 62 Cong. Rec. 2268, see Assn. Br. App. 42a-43a.

The Walsh amendment was defeated (*ibid.*). Neither in debate on this amendment, nor elsewhere, did proponents of Capper-Volstead dispute Senator Walsh's interpretation (see Assn. Br. 55-57).

In short, the evidence showed that the Association paid a reasonable price for a distribution outlet that was to enhance and did enhance the value of 2000 farmers' surplus milk; that the covenant not to compete signed by Embassy's sellers was wholly in accord with ordinary business practice; and that membership in the Association or a market for their milk was offered to the farmers who had been supplying Embassy. The acquisition furthered the collective-marketing purposes of the cooperative and was not even alleged to have unduly enhanced prices to the public. This is precisely what the Capper-Volstead Act, the Agricultural Marketing Act, the Farmer Cooperative Service of the Department of Agriculture, the Baltimore Bank for Cooperatives and Congress always intended.

C. The Government's New Borden Argument

According to the jurisdictional statements in these cases, the parties were in substantial agreement that *United States* v. *Borden Co.*, 308 U.S. 188 (1939), was not "fully determinative" of the issue whether farmer cooperatives "not acting in combination or conspiracy with outsiders" were exempt from prosecution for monopolization (Gov. Jur. St. No. 73, p. 9; see Assn. Jur. St. No. 62, p. 13). In its brief on the merits, however, the Government now rereads *Borden* as being "dispositive" of the identical issue (Gov. Br. 25).

The attempt of the Government to read into *Borden*, a case of conspiracy with outsiders, an implicit determination of the issue of monopolization by a Capper-

Volstead cooperative acting alone, is no more valid than was the attempt by Nashville Milk Co. to read into this Court's decisions in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954), and *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 (1947), implicit holdings that Section 3 of the Robinson-Patman Act was a civil damage statute. (Brief of Nashville Milk Co., petitioner, No. 67, October Term, 1957, at 21-22). See *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373 (1958). By stretching *Borden* beyond the issues presented to or considered by this Court, the Government would convert a sound limitation on the exemption of farmer cooperatives into a complete repeal of the exemption and a negation of its accompanying procedure.

With regard to the charge of monopolization under Section 2 of the Sherman Act, the Government suggests that a cooperative whose "control over supply or price" is "obtained by excluding non-member producers from the market, by predatory pricing to achieve this end, or by combining with others" (Gov. Br. 13) transcends the authorization of Section 1 of the Capper-Volstead Act. We do not dispute that under *Borden*, "combining with others" exceeds the authorization of Section 1, but concerning the Section 2 charge there is neither evidence nor allegation of any such conduct by the Association. Unilateral action by a cooperative, whether to exclude others, to sell or not to sell its product, to price arbitrarily or to buy a distribution outlet (Gov. Br. 31-32) was not involved in and is not controlled by *Borden*. "Coercion," "leverage," "anticompetitive intent" and "exclusion" are allegations which, if *Borden* were extended to unilateral action, can rest on the mere existence of the power in-

herent in a combination of most of the farmers in the market. (See Assn. Br. 91 *et seq.*) Any vertical integration, whether by acquisition or construction, will lessen the cooperative's dependence on other dealer outlets and may subject it to charges of "boycotting" and "refusals to sell". (Gov. Br. 32). Any lowering of the cooperative's prices can be charged as "predatory" (*ibid.*). Antitrust prosecutors would have a field day, as the Government's brief so well illustrates, if they could seek indictments for monopolization on the basis of the activities of a Capper-Volstead cooperative acting alone.

With regard to the Sherman and Clayton Act charges against the Association's acquisition of Embassy, the Government urges a different application of *Borden*. It suggests that Section 1 of the Capper-Volstead Act contains its own limitation since the word "necessary," which appears in the authorization of cooperatives to "make the necessary contracts and agreements," really means "lawful." See e.g. Gov. Br. 27, 38. Such an interpretation, if accepted, would render the entire authorization meaningless, for no corporation or association needs an act of Congress to permit it to make lawful contracts. If a contract is "necessary" to carry out the anticompetitive purposes for which cooperatives were created, that word cannot be construed as an invitation to antitrust prosecutors to allege that a contract to purchase marketing facilities was equivalent to a "conspiracy" (Gov. Br. 27) within the meaning of *Borden*.

In our view, the *Borden* case sets forth the only reasonable test for applying the antitrust laws to cooperatives. That test would subject the Association to Sherman Act prosecution if the charge were that it

combined or conspired with outsiders to achieve common domination or control of the market. The Government's complaint as originally filed made no such allegation. The Amended Complaint, however, did charge that the Embassy transaction was a "conspiracy" under Sections 1 and 3 of the Sherman Act; but no evidence was ever offered, and no such finding was made (Assn. Br. 28-30).[9] The district court's ruling against the Association under Section 3 of the Sherman Act in the absence of proof by the Government of a competitive advantage to the other party to the transaction, i.e. the sellers of Embassy, was based on the theory that such proof was unnecessary (R. 505) and that the Association's unilateral conduct in its own self-interest was amenable to antitrust standards because an outsider was involved in the transaction. Compare *Hutcheson* v. *United States*, 312 U.S. 219 (1941).

The Government's proposed application of *Borden* would also emasculate the procedural provisions of Section 2 of the Capper-Volstead Act. That section is portrayed as if it did no more than establish discretionary administrative price regulation over cooperative monopolies (Gov. Br. 13, 25). Section 2's command that the Secretary of Agriculture "shall" institute action against suspected cooperatives is misread as if it confers discretion, as if it merely "per-

[9] The Government's brief makes passing reference to the support by other dealers of the Association's acquisition of Embassy (Gov. Br. 10). The fact is that the Government's complaint alleged no participation by other dealers in the acquisition (R. 18-21), the court made no finding thereon (R. 480, 504), and the only testimony at trial relating to the views of other dealers was given by the Association's manager who testified that he did not discuss with any distributor in the Washington market the proposed acquisition by the Association of Embassy Dairy (R. 387-388).

mits" the Secretary of Agriculture to proceed (Gov. Br. 13). The procedure is described as an ordinary "administrative proceeding" (Gov. Br. 13), one which "simply makes provision for corrective administrative action" (Gov. Br. 25). The range of equitable Sherman Act remedies available against cooperatives in district court, but unavailable in the enforcement of orders of other administrative agencies, is wholly ignored. Compare Assn. Br. 48-50. Instead, the role of the Department of Justice in Capper-Volstead Act enforcement is depicted as that of an errand boy whom the Secretary of Agriculture may send into a district court simply to seek affirmation of his Section 2 order (Gov. Br. 21). By describing district court jurisdiction as if confined to "enjoining violation of the Secretary's order," or "modifying or setting aside the order" (Gov. Br. 21), the Government passes over the critical provision in Section 2 which empowers the district court to "enter such other decree as the court may deem equitable" in enforcing the Secretary's order "against monopolization or restraint of trade"—a provision designed to permit the court to "apply any remedy against that particular monopoly and restraint of trade that it could now apply under the Sherman Act" (62 Cong. Rec. 2167, Assn. Br. App. 40a). *Borden* never reached these provisions.

We agree with the Government that the problem in this case, as in *Borden* and *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797 (1945), is to determine how far Congress intended "to neutralize the results envisioned" by the antitrust laws (Gov. Br. 28). We believe that the conspiracy test applied in those two cases—involving farmer cooperatives and labor unions—governs here, and that the fact that the test

may be asserted to "bring about a wholly undesirable result," one which leaves the exempt organization "free to engage in conduct which restrains trade," 325 U.S. at 810, affords no reason for judicial repeal of the exemption. As so aptly stated by this Court in the *Hutcheson* case (312 U.S. at 232):

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

This Court's opinion in *Allen Bradley* reaffirmed *Hutcheson*, italicized the language of *Borden* that conspiracy "*with other persons*" (325 U.S. at 808) had been the touchstone of violation, and made it clear that exemption was to be forfeited only where unions "aid non-labor groups to create business monopolies and to control the marketing of goods and services." 325 U.S. at 808. Thus, whether or not exemption is to be accorded does not depend on whether the exempt organization's activities are considered desirable or undesirable, but "means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." 325 U.S. at 810. In a companion case, *Hunt* v. *Crumboch*, 325 U.S. 821 (1945), exemption was upheld despite the fact that the union's boycotting activities completely excluded a trucking company from doing business in the market. And in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 557-60 (1939), this Court sustained the "competitive advantages" accorded to farmer cooperatives by a

federal marketing order despite the charges that "coercive tactics" and "ulterior motives of corporate aggrandizement" characterized the cooperatives' efforts to secure a "monopoly of the market."

In short, the element of conspiracy was by no means incidental to the holding in *Borden*. To the contrary, conspiracy with outsiders has been the essential ingredient of each decision of this Court in which a farmer cooperative or a labor union has been held to have forfeited its statutory exemption. If unilateral action in restraint of trade by a farmer cooperative is to be subjected to antitrust prosecution, it is Congress and not this Court that should be asked to amend or repeal the existing exemption accorded by the Capper-Volstead Act.[10]

II. THE DISTRICT COURT'S JUDGMENT GRANTS FULL AND ADEQUATE RELIEF

The Government urges that in the event this Court holds the Association to be subject to conventional antitrust enforcement, the judgment entered by the district court should be modified because it "fails to provide sufficient safeguards to insure a divestiture which will result in establishment of an effectively competing independent dairy" (Gov. Br. 47). The judgment itself

[10] The Government also argues (Gov. Br. 38-45) that the last paragraph of Section 7 of the Clayton Act did not "broaden the existing antitrust immunity of agricultural cooperatives under Capper-Volstead" (Gov. Br. 45). We agree. As demonstrated by our principal brief, the inclusion of the Secretary of Agriculture in the last paragraph of Section 7 by its 1950 amendment simply recognized and reaffirmed cooperatives' 1922 Capper-Volstead exemption (Assn. Br. 65-71). The Government's description of how the Secretary came to be included in the 1950 amendment parallels our own and discloses no alternative statutory reference to account for the language of the amendment.

(R. 85-87) is the best refutation of the Government's contention. The Association is ordered to dispose of "as a unit and as a going dairy business all assets of Embassy Dairy, Inc., tangible and intangible, which it acquired on July 26, 1954, and replacements therefor" (¶ 4). The divestiture must be carried out "in good faith" and requires prior approval of the district court (¶ 5). The Association must report its efforts to effect the divestiture to the court within 60 days of the effective date of the judgment, every 90 days thereafter and "on such other dates as [the] Court may order" (¶ 5). Pending divestiture the Association must "administer the assets acquired from Embassy Dairy, Inc., and replacements therefor in good faith as a going dairy business with a view to preserving the said assets in as good condition as possible, ordinary wear and tear excepted" (¶ 6). The court retained jurisdiction to enable either party to apply for further orders and interpretations of the judgment, and "for the enforcement of compliance therewith and punishment of violations thereof" (¶ 8).

Remarks by the court in the hearing on relief explain and amplify the above provisions. At the outset, the court declared that it intended "to order divestiture of the assets of Embassy Dairy—of course, a complete divestiture, a bona fide divestiture—and a cancellation of the auxiliary contracts". (R. 507). The court carefully considered all contentions and questions raised, indicated the intended application of the judgment to hypothetical situations, and assured the Government that it (R. 534):

> always put a very broad construction on the words, "good faith." And any time the Government finds anything not done in good faith, you just make an

> appropriate application to the Court, and I will entertain it sympathetically.

Furthermore, the court stressed repeatedly that it retained jurisdiction, so that the Government could apply to the court for such additional relief as the circumstances warranted (see e.g. R. 517, 527, 529, 536).

This Court has always recognized that district courts "are vested with large discretion to model their judgments to fit the exigencies of the particular case," *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401 (1947), and it has refused to "direct a recasting of the decree except on a showing of abuse of discretion." *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185 (1944). Moreover, it has been particularly reluctant to intervene where, as here, the district court has retained jurisdiction. Thus, in *Associated Press* v. *United States, supra*, where the Government, as here, sought a broadening of the decree entered in its favor, this Court observed:

> If, as the government apprehends, the decree in its present form should not prove adequate to prevent further discriminatory trade restraints against non-member newspapers, the Court's retention of the cause will enable it to take the necessary measures to cause the decree to be fully and faithfully carried out.

See also *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 157 (1951); *International Salt Co.* v. *United States, supra*, 332 U.S. at 401-402. Here, similarly, if the Government's apprehensions should be realized the court could readily take necessary measures to assure that Embassy would be restored to the market as an effectively competing independent dairy. The

terms of the decree and the court's remarks leave no doubt that this would be done.

Analysis of the specific modifications proposed by the Government shows that they go far beyond the Government's purported objective of insuring "establishment of an effectively competing independent dairy."

(a) *Assets To Be Divested*

The Government urges that the district court erred in describing the assets to be divested as including only those assets "which it acquired on July 26, 1954, and replacements therefor" (Gov. Br. 47). It contends that the judgment should be rewritten to require the Association to divest all assets used, as of the date of disposition, in the dairy business conducted under the trade name "Embassy Dairy," including assets acquired by the Association from the Richfield-Wakefield Dairy. Thus, although the Government does not challenge the district court's holding that the Richfield-Wakefield acquisition was lawful (Gov. Br. 11 n. 9), it nevertheless seeks to nullify that holding indirectly.

It is the essence of the Government's position that failure to provide for divestiture of all assets presently used in the Embassy operation may make it possible for the Association to divest an outmoded, antiquated, and competitively insignificant Embassy Dairy, stripped of modern machinery and other assets added in the five years since 1954. It seems plain that any attempt by the Association along these lines would be doomed. Thus, the court noted that if, for example, the Association "bought new milking machines, or something of that sort, [o]f course, that is

part of the business" (R. 536).[11] And, when Government counsel suggested that "Embassy can be allowed to run down hill," the court replied, "They must administer the assets in good faith as a going dairy concern" (R. 527). On the other hand, the modification which the Government seeks would deprive the Association of the use of lawfully acquired assets which it used in expanding the Embassy operation—in part to serve Richfield-Wakefield business—but which are by no means indispensable to its operation as a going, competitively significant dairy business. The district court considered hypothetically the question whether Richfield-Wakefield trucks impressed into use for the purpose of expanding, rather than merely for maintaining, the Embassy business should be divested. It concluded that such trucks should not "be comprehended by this divestiture" (R. 533). The Federal Trade Commission has likewise ruled that a divestiture order in a merger case need not "require the divestiture of all such assets added to the property by the respondent if the divestment may be otherwise accomplished without destroying the operating condition and organization of the acquired mill, substantially as it existed at or around the time of the acquisition." *In the Matter of Crown Zellerbach Corp.*, 1958 CCH Trade Reg. Rep. ¶ 26,923, p. 36,462.

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[11] The Government states that the court declined to rule whether the judgment would require divestiture of new equipment purchased by the Association and used in the Embassy operation (Gov. Br. 48). Actually, the court declined to "give an advance interpretation" with respect to a specific item of equipment which Embassy had purchased "because the situation will be governed by detailed facts existing at the moment." As the court said, to rule in advance on a situation that might depend on specific facts would have been "rather improvident and perhaps almost injudicial . . ." (R. 537).

(b) *Operation of Another Dairy*

The Government contends that the judgment should have prohibited the Association from operating any dairy other than Embassy pending divestiture and for an unspecified period thereafter (Gov. Br. 49). The Government expresses concern that the decree does not adequately guard against pre-divestiture impairment of Embassy (Gov. Br. 49). This fear is explicitly laid to rest by the judgment itself. The Association is required prior to divestiture to administer the Embassy assets and replacements "in good faith as a going dairy business" (¶ 6) and to dispose of them "as a unit and as a going dairy business" (¶ 4), under continuing court supervision to insure good faith compliance (¶ 8). Any attempt to siphon off the Embassy Dairy assets to another dairy operated by the Association prior to divestiture would clearly be subject to these provisions. Indeed, Government counsel asked specifically whether the defendant would have a right to say: "We are going to break out the Wakefield part of this business and we will designate this as an account that you, Wakefield—or whatever the name shall be—shall solicit." To this the court replied, "I think that is all covered by the good faith provision," adding that the court "always put a very broad construction on the words, 'good faith'" (R. 534). As the court observed, the Association is bound to maintain Embassy "as a going dairy business . . . If you find any lack of good faith, all you have to do is to make an application at the foot of the decree" (R. 527).

The Government also urges that the district court should have enjoined the Association from operating Richfield-Wakefield or any other dairy for an unspeci-

fied period after divestiture. Such a prohibition would seriously impair the Association's statutory right to market its members milk, without requiring any showing whatever that the Association's re-entry into the milk distribution business would adversely affect competition. Limitations of this character obviously depend on the evidence presented to the court; yet at the hearing below the Government neither presented nor offered any evidence whatsoever to justify the injunction. In the absence of a strong showing of necessity, it would have been an abuse of discretion for the trial court to have included such a drastic prohibition. Cf. *United States* v. *National Lead Co.*, 332 U.S. 319, 353 (1947).

Moreover, the Government's effort to insulate Embassy from competition after divestiture ignores the facts, fully understood by the district court of the highly competitive character of the dairy business in Washington. Many firms, representing 90 per cent of the distribution market (Gov. Exh. 120, Table T, R. 686), presently confront Embassy and will continue to confront Embassy, by whomsoever owned, with persistent efforts to capture its customers. In short, the judgment assures total divestiture of a going business, but quite properly does not go so far as to attempt to provide a sanctuary from competition.

(c) *Injunction Against Future Acquisitions*

The Government contends that the judgment should be rewritten so as to prohibit the Association from acquiring any milk business in the Washington market "without (a) prior notice to the United States and, if it objected, (b) approval of the acquisition by the

court upon a showing that it would not substantially lessen competition or tend to create a monopoly in the sale or distribution of fluid milk in that market" (Gov. Br. 50). Such a prohibition is utterly unwarranted. Should this Court hold that the Association is amenable to suit under Section 7 of the Clayton Act, the Government can invoke that statute whenever an acquisition by the Association has the proscribed effects on competition. The Government advances no valid reason either for shifting the burden of proof to the Association or for requiring prior notice. While the Government blandly asserts that "the record in this case demonstrates the difficulty of undoing a consummated acquisition in the dairy business" (*ibid.*), it points to nothing in the record supporting this assertion. We submit that, in fact, the record demonstrates that the Association has operated Embassy as a separate division and, if finally ordered to do so, can dispose of Embassy as a fully operating, competitively significant, going dairy business. Moreover, the Government's concern that the Association will be unable to find a purchaser for Embassy if the Association is permitted to re-enter the market is entirely speculative and premature. The court retains jurisdiction and should such difficulty arise could make appropriate modifications in light of the actual circumstances existing at the time.

This case is vastly different from *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944), or *Schine Chain Theatres* v. *United States*, 334 U.S. 110 (1948), on which the Government relies. The trial in those cases established unlawful acquisitions as the "pattern of past conduct." *United States* v. *Crescent Amusement Co.*, 323 U.S. at 186. The Government relies

on no such pattern here.[12] At the hearing on relief, the district court made this very distinction, and counsel for the Government agreed "that a single transaction is here involved . . ." (R. 515). There is no warrant in the record, no proffer of evidence, no precedent in decisions of this Court for requiring a district court to impose an antitrust straitjacket on a party who has been found to have made but a single unlawful purchase. See *United States* v. *Bethlehem Steel Corporation* (Civil Action No. 117328, S.D.N.Y.) where similar relief was sought by the Government but denied in the unreported judgment of December 19, 1958.

(d) *Visitation Rights*

The refusal of the district court to grant broad visitation rights over the books, records, personnel and affairs of the Association will not impair the Government's ability to determine compliance with the divestiture decree. The Government asserts that while denial of visitation rights might be proper as an exercise of the court's discretion, the court erred here in basing its denial on the ground that visitation rights are comparable to an unlawful search and seizure. The district court, however, was under no illusion that the Fourth Amendment in any way precluded it from granting such rights where appropriate or necessary to assure compliance. The court recognized that it had "discretion to include such a provision," but declined to exercise it (R. 518). In the circumstances presented, this was not an abuse of discretion. The district court believed that compliance could adequately be assured by scrutiny of the reports which the Association is

[12] Brief In Opposition to Motion To Dismiss in Part, page 6.

required to file every 90 days and "on such other dates as [the] Court may order" (¶ 5), and by the assurance given to Government counsel that:

> If there is any reason for examining books and papers, you may make an application at the proper time to this Court at the foot of the decree (R. 517).

Such a procedure for supervising the faithful execution of a judgment squarely accords with the rulings of this Court. *Associated Press* v. *United States*, *supra*, 326 U.S. at 22-23; *Lorain Journal Co.* v. *United States*, *supra*, 342 U.S. at 156-157.

It does not appear that the Government any longer presses for the provision sought in its proposed judgment (R. 83) under which it could require the Association "to submit such reports in writing under oath . . . as may from time to time be necessary to the enforcement of this Judgment." In any event, in *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 718, n. 3, 728 (1944), this Court expressly held that a substantially identical provision was "too indefinite for judicial enforcement and therefore improper."

CONCLUSION

For all of the foregoing reasons we respectfully urge that the judgment of the district court in No. 62 be reversed and the judgment in No. 73 be affirmed.

Respectfully submitted,

WILLIAM J. HUGHES, JR.
821 15th Street, N. W.
Washington 5, D. C.

HERBERT A. BERGSON
HOWARD ADLER, JR.
DANIEL H. MARGOLIS
918 16th Street, N. W.
Washington 6, D. C.

Attorneys for Maryland & Virginia Milk Producers Association, Inc.

Of Counsel:

BERGSON & BERKLAND
918 16th Street, N. W.
Washington 6, D. C.

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